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83-1657

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES T. LICAVOLI
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

Supreme Court of the United States

NO. A-700

JAMES T. LICAVOLI
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1984.

Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 6th day
of March, 1984.

APPENDIX B

Nos. 82-3498, 3509, 3510, 3511, 3512, 3513, and 3606

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES T. LICAVOLI (82-3498),
ANTHONY LIBERATORE (82-3509, 82-3606),
JOHN P. CALANDRA (82-3510),
PASQUALE CISTERNINO (82-3511),
RONALD CARABBIA (82-3512),
KENNETH CIARCIA (82-3513),
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed January 9, 1984

Before: MERRITT and KENNEDY, Circuit Judges, and PRATT, District Judge.*

KENNEDY, Circuit Judge, delivered the opinion of the Court, in which PRATT, District Judge concurred. MERRITT, Circuit Judge, (pp. 23-24) filed a separate concurring opinion.

KENNEDY, Circuit Judge. The six defendant-appellants were convicted of conspiring to participate in the affairs of an enter-

* Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

prise through a pattern of racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962(c) and (d)[1] following a jury trial, and now appeal those convictions. Defendant Liberatore also appeals a denial of his motion for a new trial on a bribery conviction. All seven appeals have been consolidated. We affirm the judgments of conviction of all defendants.

In order to sustain a prosecution under RICO the government must establish that defendants engaged in a "pattern of racketeering activity," defined as at least two acts of racketeering activity. 18 U.S.C. § 1961(5). "Racketeering activity" is defined in 18 U.S.C. § 1961(1). The facts elicited by the prosecution at trial to prove the defendants' pattern of racketeering activity are lengthy and complex. Briefly, the government asserts (and we agree) that the evidence, viewed in the light most favorable to it, established the following.

I. Facts

Defendant Licavoli is a leader of organized crime in Cleveland. Liberatore is his second-in-command, and Calandra also holds a position of confidence and responsibility within the organization. Carabbia and Cisternino act for the organization, carrying out the orders of the top men. Ciarcia manages a car dealership and supplies vehicles for the organization's criminal activities and also acts on behalf of the organization in other ways.

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[1] Those sections provide as follows:

> (c) It shall be unlawful for any person to be employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to violate any of the provisions of subsections (a), (b), or (c) of this section.

In the spring of 1976 Licavoli decided that he needed to have one Danny Greene killed. Greene was the leader of a rival criminal organization which had developed a monopoly on criminal activity in West Cleveland. Licavoli had others in his organization contact Raymond Ferritto regarding his wish to have Greene killed.[2] Ferritto testified that he met at various times with each of the defendants (except Liberatore), sometimes separately, sometimes in groups, to plan Greene's murder. Ferritto stalked Greene for some months without success, sometimes assisted by Cisternino. After Ferritto had been on the job for some time he asked Licavoli for money to cover his expenses, and he was eventually given $5,000 by Carabbia. Licavoli also told Ferritto that he would get a percentage of money derived from gambling in the Warren and Youngstown areas when the murder was accomplished.

Ferritto and Cisternino attempted to bomb Greene's apartment building in order to kill him, but never carried through because of the regular presence of older people in the area. On another occasion they drove to a party attended by Greene intending to kill him. They located Greene's car but found that it was guarded by members of Greene's criminal organization seated in an adjacent car.

Meanwhile Liberatore arranged with two other men, Aratari[3] and Guiles, to kill others in Greene's criminal organization, and ultimately to help kill Greene as well. Aratari and Guiles were at times assisted in their efforts by defendants Carabbia, Calandra, Cisternino and Ciarcia. Ciarcia and another man provided Aratari and Guiles with a car and weapons.

Licavoli had Greene's phone tapped in an effort to obtain reliable information regarding Greene's daily activities. Carab-

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[2] Ferritto later testified against all six defendants in their state trials for Greene's murder.

[3] Aratari testified at the trial in this case.

bia and Cisternino gave Ferritto the resulting tapes. One tape revealed that Greene was to go to a dentist's appointment at 2:30 p.m. on Thursday, October 6, 1977. Defendants Licavoli, Cisternino and Carabbia played this tape for Ferritto on Monday, October 3.

On Thursday, the day of Greene's dentist appointment, Cisternino and Ferritto built a bomb in an apartment maintained by Cisternino. Ferritto drove to the vicinity of the dentist's office with the bomb in his car, a Plymouth. Carabbia drove a second car to the office, a Nova. This car had a special box mounted on the side in which the bomb was to be placed. Cisternino remained behind at the apartment to listen to a police scanner for calls. A few minutes after Ferritto and Carabbia arrived at the dentist's, Aratari and Guiles arrived in another car, supplied by Ciarcia as the car to be used in "the Danny Greene case." Guiles was armed with a high powered rifle. The plan was for Guiles to shoot Greene if he had the opportunity. The bomb was to be used as a backup method.

Greene arrived for his appointment, parked his car and entered the office. Guiles apparently had no opportunity to shoot. A few minutes later a parking space opened next to Greene's car. Ferritto placed the bomb in the box on the side of the Nova, parked the Nova next to Greene's car, and activated the bomb. Then he got into the driver's seat of the Plymouth, which was parked down the block. When Greene emerged from the office Ferritto began to drive away, with Carabbia in the back seat. Carabbia then detonated the bomb with a remote control device and Danny Greene was killed.

All six defendants in the present case were tried for Danny Greene's murder in state court. Cisternino, Carabbia and Ciarcia were convicted of Greene's murder.

The RICO prosecution now on appeal also relied on a separate set of events to establish a predicate criminal act.

Ms. Geraldine Rabinowitz[4] worked as a file clerk in the Cleveland office of the FBI, while her then-fiance Jeffrey Rabinowitz worked at the car dealership that Ciarcia managed. In the spring of 1977 Ciarcia asked Ms. Rabinowitz to obtain confidential information from the FBI regarding investigations of himself, Liberatore, and Licavoli. Ms. Rabinowitz complied, after some hesitation, and continued to steal confidential information for Ciarcia from time to time throughout the summer of 1977. Ciarcia assured Ms. Rabinowitz that she would in return be "covered" for a downpayment on a new home that she and her fiance planned to buy. On October 12, 1977 the Rabinowitzes met with Liberatore and Ciarcia, and the Rabinowitzes asked for $15,000 for a down payment on the home. Although Liberatore was at first unwilling to comply with this request, the next day he delivered a paper bag to Ms. Rabinowitz containing $15,000 in cash. Counsel for Liberatore characterized this payment as a "loan", but no interest was set, no repayment schedule made, and no collateral specified. The stolen FBI documents were later found at Ciarcia's car dealership. All six defendants were charged with two counts of bribery and one count of conspiracy to commit bribery and were tried in federal court. Ciarcia pleaded guilty to all three counts, and Liberatore was convicted of the conspiracy count and one substantive count.

All six defendants were tried together in federal court for the RICO violation. The jury found all six guilty of having violated RICO. Defendants now raise a large number of issues on appeal.

II. Conspiracy to Murder May Be a Predicate Act for a RICO Conviction

The District Court instructed the jury that there were three possible acts which the jury could find to serve as

[4] Ms. Rabinowitz testified at the federal bribery trial and the trial in this case.

predicate acts of racketeering for the RICO charge. These were: 1) conspiracy to murder Danny Greene; 2) the murder of Danny Greene; and 3) bribery. The court instructed that the bribery act applied only to defendants Liberatore and Ciarcia. The jury therefore had to find that the other four defendants both conspired to murder, and murdered Danny Greene in order to convict them of the RICO violation. These four defendants (Licavoli, Calandra, Carabbia, Cisternino) now argue that conspiracy to commit murder cannot serve as a predicate act for a RICO conviction, and that their RICO convictions therefore cannot stand.

Under 18 U.S.C. § 1961(1)(A) racketeering activity includes "any act or threat involving murder. . . ." Conspiracy to murder on its face fits within this definition of racketeering activity. Conspiracy is "an act . . . involving murder." However the original versions of the bill that ultimately became RICO specifically included conspiracy as a predicate act under section 1961, while the final bill did not. Defendants argue that Congress' failure specifically to enumerate conspiracy in the final version of the bill demonstrates a legislative intent not to allow conspiracy as a predicate act.

The Second Circuit rejected this argument with respect to conspiracies to commit acts listed in the definition of racketeering activity under section 1961(1)(D) in *United States* v. *Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). *See also United States* v. *Brooklier*, 685 F. 2d 1208, 1216 (9th Cir. 1982) (conspiracy to extort may be a predicate act), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1194 (1983); *United States* v. *Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana may be a predicate act), *cert. denied*, 455 U.S. 912 (1982).

Under 18 U.S.C. § 1961(1)(D), racketeering activity includes:

> [A]ny offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the

> felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

The Second Circuit in *Weisman* based its holding on the expansive language in (D), "any offense involving" the enumerated substantive crimes, "punishable under any law of the United States."[5] The court noted:

> This conclusion is bolstered by the fact that subsections (B) and (C) [of § 1961(1)], which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code.[6]

624 F.2d at 1124.

Subsection (A) of 18 U.S.C. § 1961(1) contains language similarly expansive to that in subsection (D). Under (A), racketeering activity includes "any act or threat involving" the substantive crime, "chargeable under state law and punishable by imprisonment for more than one year." The "provisions of . . . [RICO] should be liberally construed to effectuate its remedial purposes."[7] Organized Crime Control Act of

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[5] This language also appeared in the original drafts of the bill that became RICO.

[6] *Cf. Brooklier*, *supra*, which holds that

> [c]onspiracies or attempts can serve as the underlying racketeering activities because 18 U.S.C. § 1961(1)(B) defines "racketeering activity" as including those offenses indictable under 18 U.S.C. § 1951. Section 1951, in turn, makes punishable attempts or conspiracies to obstruct, delay, or affect commerce by robbery, extortion or physical violence.

685 F.2d at 1216.

[7] Courts have construed the provisions of RICO liberally in applying its criminal remedies. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237, 245 n. 25 (1982), and cases cited therein.

1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. We see no indication that Congress intended conspiracy to commit murder not to be a predicate act under section 1961(1)(A) along with conspiracy to extort, to commit securities fraud or to import drugs under section 1961(1)(D). The Fifth Circuit took the position that conspiracy to commit murder may be a predicate act in *United States* v. *Welch*, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), saying,

> There is merit to the argument that subsection A [of 18 U.S.C. § 1961(1)] is as broad and inclusive as the language of subsection D. If conspiracy to commit a section D offense can serve as a predicate act for a RICO charge, then conspiracy to commit a subsection A offense should also be able to serve as a predicate act. The language of subsection A itself – which includes "any act or threat involving murder" – appears to contemplate a conspiracy to commit murder. A conspiracy to commit murder is an act *involving* murder. (emphasis in original)

We adopt the Fifth Circuit's reasoning in *Welch* and hold that conspiracy to commit murder may be a predicate act under 18 U.S.C. § 1961(1)(A) for a RICO charge.

III. Murder and Conspiracy to Murder Are Separate Offenses under Ohio Law and May Both Be Predicate Acts under RICO

For a defendant to be convicted under RICO he must have committed more than one act of racketeering activity. In order for a state crime, such as murder or conspiracy to murder to serve as a predicate act, it must be "chargeable under state law and punishable by imprisonment for more than one year" under 18 U.S.C. § 1961(1)(A). Federal law holds that conspiracy to commit a substantive offense and the substantive offense itself are two separate crimes. *See, e.g., Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Under Ohio law, conspiracy to murder and murder are also two separate crimes.

However, a person convicted of the substantive crime "shall not be convicted of conspiracy involving the same offense." Ohio Rev. Code § 2923.01(G). Thus under Ohio law a person cannot be convicted of or sentenced for both conspiracy to commit murder and the murder crime itself. Defendants argue that the two acts consequently are not both "chargeable under state law and punishable for more than one year."

We disagree, for two reasons. First Ohio law, in both the Ohio Revised Code and the earlier case law, provides that conspiracy to commit a substantive act and the substantive act are separate offenses, both separately chargeable under state law. In *State* v. *Lucas*, 85 N.E. 2d 154, 156 (Ohio Ct. C.P. 1949), the court stated:

> The conspiracy to commit a crime is an entirely different offense from the crime that is the object of the conspiracy. It is not a substantive offense, but essentially a crime of intent. It does not merge in the completed offense. The unlawful combination and confederacy constitute the essential element of criminal conspiracy rather than the overt acts done in pursuance thereof, and neither the success nor failure of criminal conspiracies is determinative of the guilt or innocence of the conspirators.

Lucas predates the current Ohio statutory provision, Ohio Rev. Code § 2923.01.[8] The statute in *Lucas* made it a crime

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[8] The statute provides, in part:

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commisssion of any such offense.

to conspire to defraud. Under this statute, unlike the current one, a defendant could be convicted and sentenced separately for the substantive crime and conspiracy to commit the substantive crime. *Lucas* is significant here, however, for its articulation of the common law of Ohio that the conspiracy and the substantive crime are "entirely different."

The Ohio Revised Code has not modified this common law precept. Murder is a crime, chargeable under Ohio law, Ohio Rev. Code § 2903.02, and punishable by imprisonment for more than one year, § 2929.02. Conspiracy is also a crime in Ohio, Ohio Rev. Code § 2923.01(A), and is punishable by imprisonment for more than one year, § 2929.11. RICO nowhere indicates that two criminal acts otherwise qualifying as predicate acts may not both constitute predicate acts because under state law a defendant could not be convicted of or sentenced for both crimes.

Secondly, contrary to defendants' contention, it is irrelevant whether these particular defendants could have been charged under Ohio law and imprisoned for more than one year for both conspiracy to murder and murder. This argument has been raised and rejected several times in the context of state statutes of limitations, when the state statute has run on a state crime which is offered as a predicate act for a RICO violation. Courts have held that regardless of the running of the state statute the defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. § 1961 (1)(A). *United States* v. *Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979); *United States* v. *Davis*, 576 F.2d 1065, 1066-67 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States* v. *Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977). The reference to state law in the statute is simply to define the wrongful conduct, and is not meant to incorporate state procedural law. *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The Third Circuit noted in *United States*

v. *Frumento*, 563 F.2d 1083, 1087 n.8A (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978):

> Section 1961 requires, in our view, only that the *conduct* on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be "chargeable under State law" at the time of the federal indictment. (emphasis in original)

We agree and hold that conspiracy to murder and murder may both constitute predicate acts in this case, regardless of the fact that a defendant cannot under Ohio law be separately punished for having committed both crimes. Ohio law does define the two acts as separate crimes, each punishable by imprisonment for more than one year, and this is all that is required under 18 U.S.C. § 1961(1)(A).

IV. Acquittal in State Court of Criminal Acts Does Not Bar Their Use as Predicate Acts for a RICO Conviction

Defendants Licavoli and Calandra were acquitted in state court proceedings of murdering Greene and conspiring to murder Greene. Consequently, they argue, they were not "chargeable" with the murder or conspiracy to commit murder, as required under 18 U.S.C. § 1961(1)(A), and murder and conspiracy to commit murder could not therefore serve as predicate acts for their RICO convictions.

We disagree. *Frumento* is directly on point. Defendants in that case were acquitted in state court on charges of bribery, extortion and conspiracy to accept bribes. They were then convicted in federal court of violating 18 U.S.C. § 1962(c) and (d), with the above crimes as predicate acts. On appeal defendants argued that the conviction was barred by the double jeopardy clause of the fifth amendment. The Third Circuit disagreed. The court said,

> [RICO] forbids "racketeering," not state offenses per se. The state offenses referred to in the federal act are definitional only; racketeering, the federal crime, is defined as a matter of legislative draftsmanship by a reference to state law crimes. This is not to say . . . that the federal statute punishes the same conduct as that reached by state law. The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *United States* v. *Cerone*, 452 F.2d 274, 286 (7th Cir. 1971). (Footnote omitted.)

563 F.2d at 1087. *See also United States* v. *Phillips*, 664 F.2d 971, 1015, (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); *United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

V. The Prior Testimony of Raymond Ferritto Was Properly Admitted at Trial

Ferritto had testified at the state murder trials[9] of the six defendants. He refused to testify at the federal RICO trial, however, claiming that the government had breached its plea agreement with him, and consequently he had to serve more time than he had been promised. Also, he asked for immunity from prosecution for perjury as a condition of his testifying. The government granted him use immunity, that is immunity from the use of his testimony in the RICO case to prove that his prior testimony was perjurious, but granted him no immunity for any perjury he might commit in the RICO trial itself. Ferritto still refused to testify and the court held him in contempt.

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[9] There were three separate trials in state court: 1) the trial of Licavoli, Cisternino, and Carabbia; 2) the trial of Calandra, Ciarcia and Lanci (not a defendant in this action); and 3) Liberatore's trial. The charges in all three trials were conspiracy to murder Danny Greene, and Greene's murder.

The court then granted the government's motion to read Ferritto's testimony from the three state trials into the record, finding that Ferritto was "unavailable" within the meaning of Fed. Rule Evid. 804(a). The court instructed the jury that Ferritto's testimony in the state trial of Licavoli, Cisternino and Carabbia was admissible only against those three defendants; Ferritto's testimony from the trial of Calandra and Ciarcia was admissible only as to those two, and Ferritto's testimony in Liberatore's trial was admissible only against Liberatore. Ferritto's testimony in the first two trials was substantially the same. Upon the request of Liberatore's attorney the prosecution did not read Ferritto's full testimony from Liberatore's trial, but only the few lines that related specifically to Liberatore.

Defendants make several arguments regarding Ferritto's testimony. First they claim that the government was responsible for Ferritto's failure to testify. He was therefore not "unavailable" under Fed. Rule Evid. 804(a), and his testimony was inadmissible. Rule 804(a) states, in part, "[a] declarant is not unavailable as a witness if his . . . absence is due to the procurement or wrongdoing of the proponent of his statement *for the purpose of preventing the witness from attending or testifying*" (emphasis added). The law is clear that Ferritto's prior testimony, if otherwise admissible, was not made inadmissible by the government's actions unless the government actually sought to prevent the witness from testifying. *Steele* v. *Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1501 (1983); *United States* v. *Seijo*, 595 F.2d 116, 119-20 (2d Cir. 1979). This was hardly the case. Ferritto was the government's star witness. The government even offered him immunity from possible perjury prosecution to induce him to testify. There is no suggestion in the record that the government breached its plea agreement *in order* to prevent Ferritto from testifying at the RICO trial.

Defendants further argue that Ferritto's testimony should not have been admitted because 1) defendants did not have an adequate motive and opportunity to cross-examine Ferritto in the state proceedings, and 2) admission of the prior testimony violated the confrontation clause of the sixth amendment.

Federal Rule of Evidence 804(b)(1) allows admission of prior testimony if the issues in both cases are sufficiently similar so as to give the party against whom the testimony is offered "an opportunity and similar motive to develop the testimony." Here the issues in the cases were nearly identical, since in the state cases the defendants were charged with murder and conspiracy to commit murder, and in the RICO prosecution these two acts constituted the predicate acts for the RICO conviction. Defendants argue that because of the additional "enterprise" element that must be shown in a RICO prosecution their motive to cross-examine was not the same here as in the state prosecutions. However, defendants have failed to point to any matter that they would have raised in cross-examination with respect to the enterprise element that they did not raise in the prior proceedings.

Each defendant certainly had adequate motive to cross-examine Ferritto with respect to testimony given in his own trial. The jury was carefully instructed to consider against each defendant only the testimony that Ferritto had given at the defendant's own trial. We agree with defendants that it may be humanly impossible for a juror completely to compartmentalize multiple versions of an event and apply each version only against a certain defendant. However, this is not to say that evidence implicating more than one defendant in a joint prosecution may never be admitted with an instruction that it applies only to a single defendant. In this case the testimony in the state trials was substantially the same, so it is hard to see how any of the defendants was prejudiced by admission of more than one version of the events. To the extent that there are discrepancies in Ferritto's testimony the jury was made

aware of these by virtue of having heard the different versions. The jury heard both Ferritto's direct testimony and cross-examinations. We cannot say that Ferritto's testimony was improperly admitted.

The above analysis applies as well with respect to defendants' confrontation clause argument. The Supreme Court long ago held that admitting testimony of an unavailable witness does not violate the confrontation clause. *Mattox* v. *United States*, 156 U.S. 237, 242-44 (1895). The confrontation clause requires that a hearsay declarant be unavailable, and that his statements bear some "indicia of reliability." *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980); *Mancussi* v. *Stubbs*, 408 U.S. 204, 213 (1974); *California* v. *Green*, 399 U.S. 149, 161 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965). We have concluded that Ferritto was unavailable. Ferritto has been cross-examined at length by one or more of the defendants on all of the testimony that was read to the jury and those cross-examinations were also read to the jury. All of the defendants have cross-examined Ferritto about the same set of facts. The defendants' motives for cross-examination at the state trials and the RICO trial were substantially identical. We find that the indicia of reliability necessary to satisfy the confrontation clause are present here and hold that Ferritto's testimony in the state prosecutions was properly admitted.

Defendants also claim that they were prejudiced by the fact that the District Court had Ferritto's testimony re-read to the jury, upon the jury's request, during jury deliberations. It is within the judge's discretion to re-read testimony for a deliberating jury. Indeed, the cases in this area generally challenge the judge's decision *not* to have the testimony re-read to the jury. *See, e.g., United States* v. *Toney*, 440 F.2d 590, 591-92 (6th Cir. 1971); *United States* v. *Almonte*, 594 F.2d 261, 265 (1st Cir. 1979). The transcripts of Ferritto's testimony are lengthy and comprised a large portion of the state's case, and it is understandable that the jury felt a need to hear

them a second time during deliberation. Defendants have failed to show that the District Court abused its discretion in allowing the transcripts to be read a second time.

VI. There was Sufficient Evidence for the Jury to Convict the Defendants

Defendant Carabbia argues that there was insufficient evidence to show that defendants agreed to participate in the affairs of the enterprise. We find this claim to be wholly without merit, as the summary of facts recited above – taken from testimony introduced at trial – demonstrates.

Defendant Liberatore argues that there was insufficient evidence to establish that he and Ciarcia bribed Ms. Rabinowitz to provide them with confidential FBI information and documents. This Court dealt fully with this question and resolved it against Liberatore in *United States* v. *Lanci and Liberatore*, 669 F.2d 391, 393 (6th Cir.), *cert. denied*, 457 U.S. 1134 (1982), and we will not consider it further here.

VII. Principles of Double Jeopardy Did Not Bar the Government from Using Bribery as a Predicate Offense for the RICO Convictions

Defendants Liberatore and Ciarcia were convicted in federal court of bribing Ms. Rabinowitz. This bribery offense was also used as a predicate act for the RICO convictions of these two defendants. Liberatore and Ciarcia now claim that use of the bribery offense in the RICO prosecution violated the double jeopardy clause of the fifth amendment.

The Supreme Court articulated the analysis to be applied to statutory schemes in order to evaluate them for double jeopardy purposes in *Whalen* v. *United States*, 445 U.S. 684 (1980). First, courts should apply the "*Blockburger* test" articulated in *Blockburger* v. *United States*, 284 U.S. 299 (1932), in order to determine whether the same act constitutes a violation of two distinct statutory provisions. To see whether

there are two offenses or only one the court must determine whether *each* provision requires proof of a fact which the other does not. When the offenses are the same under the *Blockburger* test, *Whalen* holds that "cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress." 445 U.S. at 692.

Even if the predicate act of bribery and the RICO charge fail the *Blockburger* test, which we do not decide,[10] Congress did specifically authorize cumulative sentences under RICO. *United States* v. *Hartley*, 678 F.2d 961 (11th Cir. 1982); *United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). As the *Rone* court noted:

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.

598 F.2d at 571.

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[10] *Cf. United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), in which the court concluded that the enterprise element of the RICO offense constitutes an element of the crime not required for the predicate criminal acts.

This Court has ruled on a closely related question in *United States* v. *Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981). Morelli was convicted of two counts of wire fraud, and these acts were used as predicate offenses for a RICO conviction. Morelli complained that he was subject to cruel and unusual punishment in violation of the eighth amendment because he was sentenced to fifteen years for the RICO violation, in addition to ten years for the wire fraud crimes.[11] We held that Congress "may constitutionally make the commission of crimes within a specified period of time and within the course of a particular type of enterprise an independent criminal offense. . . ." 643 F.2d at 413. We now hold that there was no violation of double jeopardy in trying defendants Liberatore and Ciarcia for both the federal bribery charge and the RICO charge.

VIII. The District Court Did Not Err in Its Evidentiary Rulings

We have reviewed defendants' challenges to various evidentiary rulings made by the District Court in admitting:

1) references to court-ordered electronic surveillance of Licavoli in which the agent referred to Licavoli's activities as "criminal";

2) references to prosecution witnesses as being in the Witness Protection Program as suggesting that defendants had threatened the witnesses;

3) references to plea bargaining agreements as suggesting that the government vouched for the truthfulness of the witness' testimony;

4) the admission of co-conspirator statements under Fed. Rule Evid. 804(d)(2)(E) as violating the confrontation clause of the sixth amendment.

We find all of these challenges to be without merit.

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[11] Appellants Liberatore and Ciarcia are serving concurrent, not consecutive sentences for their bribery and RICO convictions.

IX. The District Court Did Not Err in Denying Defendants' Motion for Severance

Defendants Licavoli, Calandra and Cisternino argue that the District Court erred in failing to grant their motions for severance at trial under Rule 14, Fed. R. Crim. Pro. They argue that they were prejudiced by evidence offered against other defendants at trial, and that the court's instructions to the jury could not have obviated that prejudice. Defendants complain primarily of evidence of bribery introduced against Liberatore and Ciarcia.

Rule 14 provides that severance may be granted if substantial prejudice would result to an individual defendant tried jointly with another.[12] The question of whether to grant a motion for severance is committed to the trial court's discretion, and rulings under Rule 14 are reviewable only on abuse of discretion. *United States* v. *Goldfarb*, 643 F.2d 422, 434 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976) (en banc); *United States* v. *Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975), *cert. denied*, 434 U.S. 903 (1977).

The general rule in conspiracy cases is that persons indicted together should be tried together. *United States* v. *Robinson*, 707 F.2d 872, 879 (6th Cir. 1983); *United States* v. *Dye*, 508 F.2d 1226, 1236 (6th Cir.), *cert. denied*, 420 U.S. 974 (1975); *United States* v. *Echeles*, 352 F.2d 892, 896 (7th Cir. 1965). This is particularly the case when, as here, offenses charged may be established against all the defendants with the same evidence. *United States* v. *Hamilton*, 689 F.2d 1262, 1275

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[12] Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

(6th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 753 (1982); *Dye*, 508 F.2d at 1236; *United States* v. *McPartin*, 595 F.2d 1321, 1333 (7th Cir. 1979). The potential prejudice to the defendant must be balanced against competing societal goals of efficient and speedy trials. *United States* v. *Davis*, 707 F.2d 880 (6th Cir. 1983); *United States* v. *Kopituk*, 690 F.2d 1289, 1317-18 (11th Cir. 1982); *Dye*, 508 F.2d at 1236; *United States* v. *Rogers*, 475 F.2d 821, 828 (7th Cir. 1973). However, a single joint trial is impermissible if it violates a defendant's right to a fundamentally fair trial. *Echeles*, 352 F.2d at 896; *Barton* v. *United States*, 263 F.2d 894, 898 (5th Cir. 1959).

Courts have put a heavy burden on defendants seeking severance, requiring a strong showing of prejudice. *Opper* v. *United States*, 348 U.S. 84, 94 (1954); *Hamilton*, 689 F.2d at 1275; *Bright*, 630 F.2d at 813; *United States* v. *Marable*, 574 F.2d 224, 231 (5th Cir. 1978). An especially compelling showing is required in RICO prosecutions. As the court noted in *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 492 (1982), "in a case of this nature it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed."

Upon a careful review of the record we cannot say that defendants have shown the compelling prejudice required for a granting of severance. At the heart of defendants' severance claim is the fact that some of them were not named in all three of the predicate racketeering acts for which evidence was introduced. We recently held in *Davis* that this circumstance alone does not necessitate severance. 707 F.2d at 883. The jury was carefully instructed that the evidence of bribery was admissible only against Liberatore and Ciarcia, and there is nothing in the record to indicate that the jurors were confused or misled. Testimony regarding the other defendants in connection with the circumstances of the bribery was tangential, and overshadowed by the major role in the events played by Liberatore and Ciarcia. The slight potential

prejudice to defendants Licavoli, Calandra and Cisternino in this case by these tangential references is outweighed by the judicial and societal interests in trying all of the defendants together. We hold that the trial judge did not abuse his discretion in denying defendants' motion for severance.

X. The District Court Did Not Err in Declining to Excuse a Juror during the Trial

Mr. McCourt, a juror in defendants' RICO trial, discovered late in the presentation of the government's case that he was acquainted with one of the government's witnesses, a Ms. Weiss who managed the apartment house involved in the aborted bombing attempt. Mr. McCourt knew Ms. Weiss because his aunt and uncle lived in the same building as Danny Greene, but had not known Ms. Weiss' last name until he saw her at trial.

Defendant Licavoli maintains that the juror "wilfully concealed material facts bearing on his suitability." However, Mr. McCourt had stated during jury selection that he had had some contacts with Danny Greene. He could not have concealed his acquaintance with the witness because he did not know that she would be a witness until he saw her at trial. At that time he promptly informed the court that he knew Ms. Weiss. The trial judge then questioned Mr. McCourt regarding his ability to make an impartial judgment, and Mr. McCourt said that he felt he could. It is hard to see how Mr. McCourt's nodding acquaintance with a minor witness for the prosecution could have seriously prejudiced defendants. Ms. Weiss testified that Danny Greene lived with a woman in the apartment building that she managed, and that she had found a box and a bottle on the property. These facts were not in dispute, and counsel for defendant Licavoli chose not to cross-examine Ms. Weiss. Mr. McCourt had personal knowledge that older people frequently congregated in the lobby of the building, but this fact was also not in dispute. Accordingly

we hold that the District Court did not err in its failure to excuse Mr. McCourt.

XI. The District Court Did Not Err in Denying Liberatore's Motion for a New Trial

Defendant Liberatore appeals a denial of a motion for a new trial on his federal bribery conviction. Liberatore argues that there were significant inconsistencies in the testimony of witnesses who testified against him. The District Court found these inconsistencies to be insubstantial, and, having reviewed the record, we agree.

Defendants have raised a number of other claims, which we do not discuss here. We have considered these and find them without merit. We affirm defendants' RICO convictions and affirm the District Court's denial of Liberatore's motion for a new trial.

MERRITT, Circuit Judge, concurring. I concur in the clear and well reasoned opinion prepared by Judge Kennedy.

It may seem strange for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene). But RICO is now unique. The normal rules of construction do not apply to RICO. Although I had earlier believed that normal canons of construction applicable to other criminal statutes should be applied to RICO, *see United States* v. *Sutton*, 605 F.2d 200 (1979), *reversed en banc*, 642 F.2d 1001, 1042 (6th Cir. 1980) (Merritt, J., dissenting), the Supreme Court has now made it clear that RICO is to be given the broadest and most expansive possible interpretation in order to carry out Congressional intent aimed at eliminating organized crime. *See United States* v. *Turkette*, 452 U.S. 576 (1981) (RICO not limited to infiltration of a legitimate "enterprise"); *Russello* v. *United States*, 104 S.Ct. 296 (1983). In *Russello*, a unanimous Supreme Court has pointed to RICO as the only federal criminal statute which should receive this kind of broad and expansive interpretation:

> The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. . . . Further, Congress directed, by § 904(a) of Pub. L. 91-452, 84 Stat. 947: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." *So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive.* . . .

104 S.Ct. at 302. (emphasis added). Thus, RICO, liberally construed as required by the Supreme Court, can reasonably be interpreted, and therefore should be interpreted,

so that a defendant can be convicted even though he has already been acquitted or convicted of the two underlying offenses in state court and even though he could not be convicted or punished for both offenses together under state law.

In view of the Supreme Court's decisions in *Turkette* and *Russello*, I therefore agree with our Court's expansive construction of RICO in sections II, III, IV and VII.

On the question of the admissibility of Ferrito's prior testimony in the three state trials, the existence of the "enterprise" element in RICO is not a bar to admissibility, as defendants argue, because the "enterprise" element, in light of the Supreme Court's holding in *Turkette*, has become a fiction. It has become synonymous with another element of the offense, namely, the "pattern of racketeering activity," *i.e.*, the two underlying state offenses. The "enterprise" element now adds nothing to the so-called "pattern" element. The two predicate offenses are the "enterprise." All that is now required for a RICO offense is the commission of two predicate offenses which the state defines as separately chargeable and separately punishable. No further indicia of "enterprise" is now necessary.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed June 3, 1982

UNITED STATES OF AMERICA *Plaintiff*	)	CR79-103
V.	)	
JAMES T. LICAVOLI, *et al* *Defendants*	)	

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Pursuant to Fed.R.Crim.P. 29(a), defendant Licavoli moves for a judgment of acquittal. After study of the motion and supporting brief filed on May 19, this court determines that legal, not evidentiary issues, are presented. Hence, the court need not await the closing of the government's presentation of evidence to consider and rule upon the serious legal issues raised by defendant Licavoli.

I.

Defendant Licavoli contends that the alleged conspiracies to kill Daniel Greene and John Nardi cannot be considered as predicate acts under 18 U.S.C. §1961. Defendant argues that "the legislative history of §1961 . . . demonstrates beyond doubt that Congress decided not to include the crime of conspiracy as a separate act of racketeering." Defendant does not cite any legislato's statement. Rather, he refers to the absence in the law's final language of conspiracy provisions contained in two Senate bills, S 1623 and S 1861. Title IX of the Organized Crime Control Act of 1970 (Chapter 96 — "Racketeer-

Influenced Corrupt Organizations'' of 18 U.S.C. §901[a]) was substituted for these bills.

S 1623 (authored by Senator Hruska, R-Neb.) was introduced on March 20, 1969 as a possible amendment to Title 18 of the United States Code. The amendment sought to control the infiltration of legitimate business by criminals through the investment of money gaied through criminal activities. Named the ''Criminal Activities Profits Act,'' the bill defined ''criminal activity'' as:

> (A) Any act involving murder, kidnapping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States:
>
> (B) Any act which is punishable under [any of a number of enumerated provisions of] Title 18, United States Code; and
>
> (C) Any conspiracy to commit any of the foregoing offenses.

On April 18, 1969, S 1861 was introduced by Senator McClellan (D-Ark.). S 1861, broader in scope than S 1623, also sought to control the investment of illegally obtained funds. Cited as the ''Corrupt Organizations Act of 1969,'' S 1861 stated that its purpose was:

> To amend Title 18, United States Code, to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and for other purposes.

Section 1961 of S 1861 defined ''racketeering activity'':

> (1) The term ''racketeering activity'' means (A) any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following [cited] provisions of Title 18, United States Code; and (C) any conspiracy to commit any of the foregoing offenses.

As enacted into law and signed by the President on Octo-

ber 15, 1970, §1961(1) of the "Racketeer-Influenced and Corrupt Organizations Act" defines "racketeering activity" as:

> (A) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;
>
> (B) Any act which is indictable under any of the following provisions of Title 18, United States Code: [enumerated provisions follow];
>
> (C) Any act which is indictable under Title 29, U.S.C., §186 . . . or §501(c) . . . ; or
>
> (D) Any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or [various drug offenses].

Thus, as enacted, §1961(1) omitted subdivision (c), the conspiracy catch-all provision contained in both S 1623 and S 1861. Defendant Licavoli argues that this is a "delet[ion]" that "plainly demonstrates Congress' intention not to make conspiracy a separate act of racketeering."

The legislative history does not reflect or refer to the dropping of the conspiracy provisions of S 1623 and S 1861. However, the Senate legislative history chronicles the replacement of the S 1861 wording of §1961(1)(A) (including the conspiracy provision) with language proposed to the Senate Judiciary Subcommittee on Criminal Laws and Procedures by the Department of Justice.

In a letter of August 11, 1969, Richard G. Kleindienst, Deputy Attorney General of the United States, responded to the subcommittee's request for the Department of Justice's views on S 1861. In his letter, Mr. Kleindienst stated:

> Section 1961 is a definition section containing the definition of such terms as racketeering activity, interstate commerce, State, person, enterprise, pattern of racketeering activity, unlawful debt, racketeering order, racketeering investigation, racketeering violation, racketeering investigator, and documentary material.
>
> It is felt that the definition of the term "racketeering activity" contained in §1961(1)(A), any act involving

> the danger of violence to life, limb, or property indictable under state or Federal law and punishable by imprisonment for more than one year, is too broad and would result in a large number of unintended applications as well as tending towards complete federalization of criminal justice. It is suggested, therefore, that §1961(1)(A) be redefined as follows:
>
> (1) The term "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury or dealing in narcotic drugs, marihuana or other dangerous drugs which is indictable under State law and punishable by imprisonment for more than one year.[1]

In his criticism of S 1861, Mr. Kleindienst did not mention the conspiracy provision. Nor did he discuss any federal criminal statute which might be a predicate for "racketeering activity." Instead, he dwelt on the Department's concerns about the wording of §1961(A) as it related to state crimes as predi-predicates for "racketeering activity." The Department of Justice expressed the feeling that the language "any [indictable] act involving the danger of violence to life, limb, or property" was "too broad and would result in a large number of unintended applications." The Department saw this as tending "towards [a] complete federalization of criminal justice."

The Senate Judiciary Committee on January 21, 1970 brought S 30 to the Senate floor. Portions of S 1861 had been incorporated into S 30 to comprise Title IX of this omnibus bill which became the Organized Crime Control Act of 1970. With reference to Title IX, Senator McClellan, the principal author and proponent of the bill, told the Senate on that day:

> The subcommittees and the full committee have now agreed with the Department of Justice on their suggested revisions and, along with other improving amendments, have approved Title IX.

See 116 Cong. Rec. 36,295 (Oct. 12, 1970). Senator McClel-

1. Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary, United States Senate, on measures relating to organized crime; 91st Cong., 1st Sess. Vol. 4, p. 405 (1969).

lan was obviously referring to the revisions suggested by Deputy Attorney General Kleindienst in his letter of August 11, 1969. A comparison of the Department of Justice's suggested revisions with §1961(1) of S 30 shows that the Senate Judiciary Committee adopted the Department's substitute language with only three changes. The crime of "usury" was deleted from the list of state crimes; the words "drugs, marihuana" were deleted to make the phrase read "narcotic or other dangerous drugs"; and "chargeable under state law" was substituted for "indictable under state law."

Without any further change in the wording of Title IX, §1961(1), S 30 was passed by the Senate on January 23, 1970. Similarly, no change in this language occurred in the House, although amendments to other titles of S 30 were made by the House. The House passed S 30 on October 7, 1970. On October 12, 1970 the Senate determined to accept the House amendments and passed S 30 on the same day. The President signed the bill into law on October 15, 1970.

In this court's memorandum and order of March 5, 1982 it determined that

> Section 1961(1)(A), relating to crimes chargeable under state law, speaks of "any act or threat *involving* murder, kidnapping, gambling . . . " [Emphasis added.] The subsection does not say "any act or threat of murder . . . " The term "involving" suggests a broader scope and an intent to include other acts in addition to the substantive crime. This broad reading of an "act" includes the crime of conspiracy. . . .

The Department of Justice suggested the broad words "any act . . . involving" as part of the substitute language for §1961(1)(A) while it made no reference to the dropping of the conspiracy provision (subsection [c]). There also is no reference to the dropping of the conspiracy provision in the Senate Report[2] in which the Department's suggested §1961(1)(A) language is approved and adopted. No inference, therefore, that the Senate intended to exclude conspiracy acts, criminal

2. See S.Rep. No. 91-617, 91st Cong., 1st Sess., p. 121 (1969).

under state law, from §1961(1)(A) may reasonably be made. To the contrary, it is reasonable to infer that the Department and the Senate Judiciary Committee concluded that incorporation of the words "any act . . . involving" intended a scope broader than the substantive crime, thus including "conspiracy to murder, kidnap, etc."

Immediately after suggesting a substitute §1961(1)(A), Deputy Attorney General Kleindienst explained:

> It is felt tht by thus narrowing the definition of the class o applicable state crimes in terms of their generic meaning, the definition of "racketeering activity" contained in §1961(1)(A) will be both broad enough to include most state statutes customarily invoked against organized crime, yet narrow enough to be constitutional. *United States v. Nardello,* 393 U.S. 286 (1969).

The key to interpreting the proposed language, later adopted into S 30 and enacted into law, is Mr. Kleindienst's suggestion that the new language would narrow the definition of the "class of applicable state crimes in terms of their generic meaning." Thus defined, the "definition of 'racketeering activity' contained in §1961(1)(A)" is "broad enough to include most state statutes customarily invoked against organized crime." When each of the enumerated state crimes is given its "generic meaning," the particular crime, *e.g.,* "murder," relates to or is "descriptive of [its] entire group or class; general . . . " *American Heritage Dictionary* (1969), p. 549. Given its generic meaning, the "group or class" of the Ohio crime of murder embraces "conspiracy to murder" as well as the substantive crime of murder.

The Senate's adoption of suggested substitute §1961(1)(A) and inclusion of the "state offenses by generic designation" is exhibited in the Senate Report's close tracking of the Kleindienst letter in the section-by-section analysis of the Organized Crime Control Act:

> Section 1961 contains definitions.
>
> Subsection (1) defines "racketeering activity" to include those crimes most often associated with organized

> crime, especially those associated with the infiltration of legitimate organizations. Those crimes are murder, kidnapping, gambling, arson, bribery, extortion, narcotic violations; counterfeiting; usury; mail, bankruptcy, wire and securities fraud; and obstruction of justice. The state offenses are included by generic designation. *Cf. United States v. Nardello*, 393 U.S. 286, 292 (1969). The Federal offenses are included by specific reference. The term "racketeering activity" is a key statutory term. Under proposed §1962, below, the racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, there can be no violation of the provisions of this title.

S.Rep. No. 91-617, 91st Cong., 1st Sess., at p. 158 (1969).

Moreover, it is evident that a conspiracy statute is one which a state may invoke "against organized crime," a stated purpose of substituted §1961(1)(A). As stated by the Senate:

> It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. See Organized Crime Control Act, P.L. 91-452, "Statement of Findings and Purpose."

The statute further provides that:

> The provisions of this title shall be liberally construed to effectuate its remedial purposes. See P.L. 91-452, §904(a), at 1970-1, U. S. Code; *Cong. and Admin. News*, 2nd Sess., at p. 1104.

Hence it is concluded that conspiracy to commit one of the §1961(1)(A)-proscribed acts "is chargeable under State

law and punishable by imprisonment for more than one year."[3] "Conspiracy to murder" is classified as "racketeering activity" under RICO.

II.

Relying on the Ohio conspiracy statute, §2923.01(F), defendant Licavoli argues, "This statute mandates the conclusion that any conspiracy here to kill *Greene and Nardi* simply cannot be fragmented into two (2) predicate acts by the government in its quest for a RICO conspiracy conviction." Before examining §2923.01(F), defendant Licavoli's argument needs to be placed in the context of the RICO conspiracy charge which is on trial.

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3. Defendant Licavoli cites *United States v. Weisman*, 624 F.2d 1118 (2nd Cir. 1980), as additional support for his argument. In *Weisman*, the Second Circuit held that "conspiracy [could] properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in §1961(1)(D)." *Ibid.*, at 1123. In reaching its decision, the Second Circuit referred to the deletion of the early drafts' conspiracy language from the final version of §1961. The court stated:

> Thus, the alterations of §1961(1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D).

Ibid., at 1124. Defendant Licavoli argues that under *Weisman*, §1961(1)(A) cannot include conspiracy offenses.

In reaching its determination, the Second Circuit compared the language of subsection D to that used in subsections B and C of §1961(1). Sections B, C and D all deal with federal crimes. Thus, the Second Circuit was impressed by the use of "any offense involving" in subsection D as opposed to the use of "any act which is indictable under [specific sections of the United States Code]" in subsections B and C. The court concluded that subsections B and C "require that the [charged] act be indictable under specifically enumerated sections of the [federal] criminal code." *Ibid.*, at 1124.

However, the Second Circuit's *ratio decidendi* does not extend to subsection A. *Weisman* did not involve any alleged conspiracy acts under §1961(1)(A). Indeed, the court did not expressly examine the legislative history chronicled in Part I, *supra*; nor did it specifically analyze or address the scope and breadth of subsection A. Subsection A deals with "acts or threats involving" designated state crimes chargeable and punishable under State law. *Weisman* was decided solely in a federal context. Thus, as recognized in *United States v. Welch*, 656 F.2d 1039, 1063, n. 32 (5th Cir. 1981), *Weisman* did not settle the issue of "whether a charge of conspiracy to murder is a proper predicate act for a RICO charge."

Defendants are charged with a violation of 18 U.S.C. §1962(d), which reads as follows:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section (c), the applicable substantive provision, provides:

> It shall be unlawful for any person employed or associated with any enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeerin activity or collection of unlawful debt.

A " 'pattern of racketeering activity' requires at least two acts of racketeering activity. . . . " 18 U.S.C. §1961(5). "Racketeering activity" is defined to include

> any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.

18 U.S.C. §1961(1)(A).

The indictment charges that defendant Licavoli (and likewise defendants Calandra, Cisternino and Carabbia) committed three predicate acts chargeable under state law: conspiracy to murder Nardi, conspiracy to murder Greene, and the murder of Greene. Defendant Licavoli questions whether a conspiracy to murder Nardi and a conspiracy to murder Greene are separately "chargeable under State law" and "punishable by imprisonment for more than one year." Defendant Licavoli argues that under division (F) there exists here only one conspiracy, not separate conspiracies to murder Greene and to murder Nardi.

O.R.C. §2923.01(F) reads:

> A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

Division (F) is explained in the Committee Comments to the law as enacted as part of the revision of Ohio's criminal code, effective January 1, 1974:[4]

> This section states that even though a conspiracy may include plans to commit more than one offense, it is still one conspiracy when these offenses are part of the same plan, agreement, or continuous conspiratorial relationship.

No reported Ohio case has considered or applied the concept set forth in division (F).

In *Braverman v. United States*, 317 U.S. 49 (1943), the issue was

> [w]hether a conviction upon the several counts of an indictment, . . . where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute. . . .

The defendant had been charged with conspiracy to violate several different provisions of the Internal Revenue laws. The Court held that when a single agreement is the prohibited conspiracy, only a single penalty may be imposed. The following reasoning is important:

> For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. *Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes.*
>
> • • •
>
> Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes.

Ibid., at 53-54.

Similarly, in *United States v. Adcock*, 487 F.2d 637 (6th Cir. 1973), the court held that where a defendant is charged

with conspiring to violate two separate statutory provisions but the case involves "a single conspiracy having as its ultimate purpose the violation of more than one substantive offense," *ibid.* at 639, it is error to sentence the defendant on both counts. The test is whether "despite the fact that defendants may have had more than one illegal objective . . . only a single agreement existed among the defendants and the other conspirators to commit these unlawful acts." *Ibid.*, at 639.

While this court must look to the state criminal law to ascertain the nature of the crime of conspiracy underlying the predicate acts charged under state laws, it is manifest that a limitation on the law of conspiracy is recognized by the federal courts and that this limitation coincides with the express language of §2923.01(F). Thus, it is essential to look at the facts presented in this case to see whether there is evidence of only one agreement to kill Nardi and Greene or of separate agreements to kill each man.[5]

The testimony of Raymond J. Ferritto in the three state proceedings as read into eviddence in this case tends to show that three meetings were held in the late spring and summer of 1976. The first meeting was with Jimmy Fratianno at the Town and Country Motel in Warren, Ohio in May of 1976. Fratianno told him that "they were having some problems in Cleveland and that he thought [Ferritto] should talk to Tony DelSanter, and that maybe [Ferritto] could make some money with him." Ferritto described further his conversation with Fratianno:

> He said they were having problems there, and that somebody was trying to hustle in, and that Tony might have some work for me and I might make some money with him.

When asked what "work" meant, Ferritto responded, "I took it to mean that he wanted somebody taken care of . . . somebody killed."

---

5. The testimony of Raymond J. Ferritto will be considered as it goes to the issue currently before the court. The court is not suggesting that the testimony is applicable only to this issue; indeed, it may be relevant to the federal RICO conspiracy charge.

"A couple of weeks later" Fratianno called Ferritto again to arrange a meeting in Warren with DelSanter. Ferritto described the subsequent meeting at Cherry's Restaurant:

> We exchanged greetings, and we sat down, and Fratianno said, "You guys have something to talk about," . . . and he left.
>
> • • •
>
> [DelSanter] asked me if Fratianno had told me about the problems that they were having, and I told him just that he said that someone was trying to muscle in on the gambling in Cleveland. But he didn't say who.
>
> And so DelSanter went on and told me that the two fellows were Nardi — John Nardi and Greene, from Cleveland, and they were muscling in on the gambling operations in Cleveland. And that he wanted them — something had to be done with them, that they had to be taken care of. And if I was interested.
>
> Q: Did you say anything?
>
> A: I said that I was interested, but I wanted to know what was in it for me. And he said that he would have to ask Jack, Jack White, he said, because he's the boss.
>
> Q: Do you know who Jack White is?
>
> A: Yes.
>
> Q: Does he go by any other name?
>
> A: Licavoli.

"Two or three weeks later," Ferritto received a telephone call from Ronald Carabbia telling him to attend a dinner meeting at Cherry's the next night. Ferritto testified that he "met Cisternino, Carabbia, Tony DelSanter [and] Jack White" at the restaurant. He related the following about the conversation:

> Tony DelSanter told Jack that I was interested in the work, and that I wanted to know what monetary returns I would get.
>
> Q: Did Jack say anything to you?
>
> A: He said that I would be taken care of.
>
> • • •

Q: In regards to the work that you were considering doing, did they discuss that matter any further with Mr. White and the other people at the table?

A: Yeah, I accepted the terms, and I said that when they got the — when they were ready, to call me. When they got the legwork done to call me.

The clear import of the Ferritto testimony is that he was hired to "take care of" the people "muscling in" on the Cleveland gambling operations. That "work" would involve the killing of Greene and Nardi.

This court finds that the facts offered through the Ferritto testimony support defendant Licavoli's argument that there exists here a single agreement, a single conspiracy to murder. As part and purpose of that agreement, several acts of murder would be committed. However, "it is . . . [the] agreement which constitutes the conspiracy which the statute punishes," *Braverman*, 317 U.S., at 53; and this court holds that on the facts of this case only a single agreement can be shown to have existed.

Under such circumstances, O.R.C. §2923.01(F) permits defendant Licavoli, and indeed all of the defendants, to be charged with only a single conspiracy. The agreement cannot be bifurcated to permit separate conspiracy charges for each of the alleged targets. Since under the evidence as read most favorably for the prosecution the defendants could not be charged under state law with separate conspiracies to murder Nardi and to murder Greene, those individual conspiracies may not be used as separate predicate acts to support an 18 U.S.C. §1962(d) conspiracy charge.

As a question of law, this court concludes that the alleged predicate acts of conspiracy to murder Nardi and conspiracy to murder Greene must be treated as one conspiracy to murder. The jury will be appropriately instructed on the following subject. As an element of the RICO conspiracy, the jury must determine that as to defendants Licavoli, Calandra, Cisternino and Carabbia each committed the following two predicate acts: (1) conspired to murder Daniel Greene and/or John Nardi;

and (2) murdered, or aided and abetted in the murder of, Daniel Greene.

As to defendants Liberatore and Ciarcia, the jury will be instructed that it must determine that each committed two of the following predicate acts: (1) conspired to murder Daniel Greene; (2) murdered, or aided and abetted in the murder of, Daniel Greene; (3) in or about October 1977, gave things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhardt, an employee of the Federal Bureau of Investigation of the U. S. Department of Justice, in violation of 18 U.S.C. §201(b)(3).

III.

Defendant Licavoli further argues that the government cannot fragment

> a unified conspiracy (that is, to kill Greene and Nardi), which charge, by force of §2923.01(G) upon conviction would merge into the substantive murder offense involving Greene, into more than one predicate act so as to accommodate the RICO charge made in this indictment.

O.R.C. §2923.01(G) reads:

> When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

In essence defendant Licavoli is arguing that because division (G) requires that the conspiracy and substantive charges merge upon conviction of the substantive offense, conspiracy to murder and murder cannot be set forth as separate predicate acts.

Defendant Licavoli's argument would be applicable if he was being prosecuted in a state court of Ohio for conspiracy to murder after conviction for the substantive offense of murder. But it is pertinent to repeat what was said in another context in this court's memorandum and order of March 5, 1982:

> This criminal prosecution is for the violation of a federal criminal statute. The defendants have not been charged

> with commission of the state crimes; they cannot be convicted of the state crimes. The state crimes referred to are definitional only. *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied sub nom. Millhouse v. United States*, 434 U.S. 1072 (1978).

Previously, in *United States v. Forsythe*, 560 F.2d 1127 (3rd Cir. 1977), the Third Circuit had explained the incorporation of state criminal offenses for "definitional purposes," stating:

> RICO is a federal law proscribing various racketeering acts which have an effect on interstate or foreign commerce. Certain of those racketeering, or predicate acts violate state law and RICO incorporates the elements of those state offenses for definitional purposes. *State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations;* it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity. *To interpret state law offenses to have more than a definitional purpose would be contrary to the legislative intent of Congress and existing state law.*

Ibid., at 1135 (emphasis added).

Similarly, in *United States v. Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied sub nom. Bertolotti v. United States*, 440 U.S. 962 (1979), the court repeated prior Fifth Circuit determinations that "the reference to state law in the federal statute is for the purpose of defining the *conduct* prohibited. . . ."

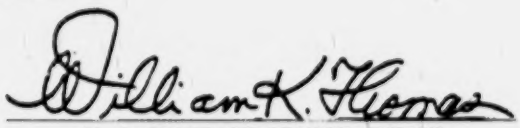
The present question is whether the predicate acts set forth in the indictment, the conspiracy to murder and the murder, are "chargeable," *i.e.*, defined, under state law. Clearly in two separate counts of an indictment a person can be charged in Ohio with conspiracy to commit an offense and the substantive offense. There is nothing in state law that requires a prosecutor to elect between the substantive offense and the conspiracy. Rather, §2923.01(G) requires a merger of the charges only upon *conviction*. Because defendants here will not be *convicted* of the state law crimes, the bar of division (G) is not applicable. Division (G) operates either to bar double sentences, as stated by this court in its March 5, 1982 memo-

randum and order, or to bar successive prosecutions for conspiracy and the substantive offense. It has no effect on the *charging* of a defendant with certain crimes. Nor does §2923.01(G) constitute any of the elements of the offense of "conspiracy to murder" under Ohio law, which the United States must prove to establish a predicate act.

The laws of Ohio define the crimes of conspiracy to commit murder and murder. Thus these crimes are separately "chargeable under State law." Therefore, it is concluded that conspiracy to murder and murder may be set forth as separate predicate acts in a RICO substantive charge (§1962[c]) and thus in a RICO conspiracy charge (§1962[d]).

Defendant Licavoli's motion for acquittal is denied as to all grounds asserted in his supporting brief.

IT IS SO ORDERED.



U. S. DISTRICT SENIOR JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed June 22, 1982

UNITED STATES OF AMERICA *Plaintiff*	)	CR79-103
V.	)	
JAMES T. LICAVOLI, *et al* *Defendants*	)	

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

Each of the defendants has moved for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The basis of a Rule 29 motion is that "the evidence is insufficient to sustain a conviction of" the offense or offenses "charged in the indictment." All defendants argue that the evidence is insufficient. Defendants intertwine arguments that:

(1) An "enterprise" has not been proved;

(2) The RICO conspiracy duration terminated with the death of Daniel Greene on October 6, 1977; and

(3) The government's evidence presents "multiple conspiracies" rather than a "single conspiracy."

First, the court turns to matters already ruled upon but reargued in connection with the Rule 29 motions.

Among his acquittal arguments defendant Licavoli incorporates his argument contained in his motion and supporting brief of May 19 that "the legislative history of §1961 . . . demonstrates beyond doubt that Congress decided not to in-

clude the crime of conspiracy as a separate act of racketeering." After an analysis of the legislative history, this court did not accept this conclusion in its memorandum and order of June 3, 1982. That conclusion is reaffirmed.

In part III of the memorandum of June 3, this court declined to accept defendant Licavoli's argument that because O.R.C. §2923.01(G) "requires that the conspiracy and substantive charges merge upon conviction of the substantive offense, conspiracy to murder and murder cannot be set forth as separate predicate acts." This court there concluded that since §2923.01(G) (Conspiracy) "requires a merger of the charges only upon conviction" and "because defendants here will not be *convicted* of the state law crimes, the bar of division (G) is not applicable [emphasis added]." That conclusion is also reaffirmed.

In a written "motion to dismiss predicate acts,"[1] defendant Liberatore also asserts merger under division (G) of O.R.C. §2923.01. Section 1961(5), defining "racketeering activity [under state law]," requires that "any act or threat involving murder . . . " be "chargeable under State law and punishable by imprisonment for more than one year." This court reiterates its conclusion that conspiracy to murder is "chargeable under state law," *i.e.*, "defined under state law." At oral argument defendant Liberatore supplemented his merger argument by dwelling on the second clause, "and punishable by imprisonment for more than one year." Use of the word "punishable" clearly renders the clause definitional in the federal assimilation of the state law. The word "punishable" does not connote, as defendant Liberatore suggests, that the state criminal law should be viewed for definitional purposes as the law is applied at the punishment stage, *i.e.*, after conviction.

A.

Based on the indictment the government charges a RICO

1. Defendant Liberatore's reading of the congressional history of the evolution of §1961 is not supported by this court's study of that history, as set forth in Part I of the memorandum of June 3, 1982.

conspiracy. Named as defendants are James T. Licavoli, also known as "Jack White"; Anthony Liberatore; John P. Calandra; Pasquale Cisternino, also known as "Butchie"; Ronald Carabbia, and Kenneth Ciarcia. Named in the indictment as alleged co-conspirators, but not as defendants, are Anthony Delsanter, also known as "Tony the Dope"; Aladena T. Fratianno, also known as "Jimmy" Fratianno; Raymond William Ferritto; Ronald A. Guiles, also known as "Vic"; and Louis J. Aratari, also known as "Tony."

During in or about May of 1976 and continuing thereafter, up to and including on or about March 3, 1978, defendants and the persons named as unindicted co-conspirators are charged with combining, conspiring and agreeing together under 18 U.S.C. §1962(d) to violate 18 U.S.C. §1962(c), the substantive RICO provision. That section makes it a crime

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

As part of the alleged conspiracy, it is charged in the indictment that the defendants and the unindicted co-conspirators, being associated with an enterprise engaged in and the activities of which affected interstate commerce, committed, carried on, and supervised criminal activity in various cities in the Northern District of Ohio by use of acts and threats involving murder, bribery, and other activities.

It is charged that in furtherance of the conspiracy and to accomplish its objects, the defendants and others committed the following acts and "pattern of racketeering activity" which, as predicate acts, are being submitted for the consideratio of the jury:

1. Defendants and the unindicted co-conspirators from in or about June 1976 up to and including on or about October 6, 1977, in the Northern District of Ohio and elsewhere, conspired to murder one Daniel J.

Greene in violation of Ohio Revised Code §2923.01.

2. The defendants and the unindicted co-conspirators, on or about October 6, 1977, did murder and aid and abet in the murder of Daniel J. Greene by means of an explosive device in violation of O.R.C. §2903.01.

3. Defendants Anthony Liberatore and Kenneth Ciarcia, in or about October 1977, corruptly did, directly and indirectly, give things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, in return for confidential information contained in the official files and records of the Federal Bureau of Investigation, in violation of 18 U.S.C. §201(b)(3).

B.

All defendants charge insufficiency of proof of an enterprise. Defendant Carabbia particularly directs his Rule 29 motion to the government's alleged failure to prove the existence of an enterprise separate and apart from the commission of the enumerated predicate acts. He argues that the government has failed to prove the defendants' involvement in the activities of the alleged enterprise and that, at most, the government has offered eviddence of defendant Carabbia's participation in a state murder offense.

The indictment alleges that as part of the RICO conspiracy, the six defendants, along with several unindicted co-conspirators,

> being associated with an enterprise engaged in and the activities of which affected interstate commerce; that is, a group of individuals associated in fact to control the criminal activities in various cities in the Northern District of Ohio, by means of murder, bribery, and other activities, unlawfully, willfully, and knowingly conduct[ed] and participate[d], directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, including murder, conspiracy to murder and bribery [as to defendants Liberatore and Ciarcia].

Defendant Carabbia argues that the government cannot prove the existence of an enterprise solely through the proof of the predicate acts but must meet certain requirements set forth in *United States v. Turkette*, 452 U.S. 576 (1981), and *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982).

18 U.S.C. §1961(4) defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." In *Turkette* the Court defined enterprise as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Ibid.*, at 583. Stating that "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government," the Court differentiated "enterprise" from "pattern of racketeering activity":

> The pattern of racketeering activity is . . . a series of criminal acts as defined by the statute. . . . The [enterprise] is proved by evidence of *an ongoing organization*, formal or informal, and by evidence that the various associates function as a *continuing unit*. The [pattern of racketeering activity] is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Significantly, the Court then ruled:

> While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.

The Court summarized:

> The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

Ibid. (emphasis added).

In *United States v. Griffin*, 660 F.2d 996 (4th Cir. 1981), the court relied upon *Turkette* in holding that to establish the existence of a "group of individuals associated in fact," *i.e.*, an illegitimate enterprise, the government must show the "pur-

pose of the association along with the composition of the group." *Ibid.*, at 999. The court noted that the government need not show a single agreement as required under traditional conspiracy law. Guilt is individualized by showing a common purpose or purposes of the group by evidence of an ongoing organization of the associates "in which they function as a 'continuing unit.' " *Ibid.*, at 1000, relying upon *Turkette*, quoted *supra*. Proof of "continuity, unit, shared purpose and identifiable structure" meets the requirement of the enterprise element. *Ibid.*

These requirements were repeated in *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982). The court adopted the *Turkette* distinction between "enterprise" and "pattern of racketeering activity" and set forth "three basic characteristics" of an enterprise. *Ibid.*, at 664 and 665. The first characteristic is "a common or shared purpose which animates those associated with it. . . . " The second is the functioning of the enterprise "as a continuing unit," *i.e.*, "some continuity of both personality and structure." Third, the government must show an " 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity." The court specifically mentioned the "command system of a Mafia family" as an example of an ascertainable structure.

It is clear from *Turkette* that the government's evidence going to proof of the predicate acts also may be used to prove the enterprise. Thus, the testimony of Raymond Ferritto will be reviewed and highlighted to determine whether there is proof of an enterprise, although some of the same evidence may also tend to prove the alleged predicate acts.

C.

Should the jury credit Raymond Ferritto's testimony, they may make the following findings. Between May and July 1976, James Fratianno, who Ferritto had known at Chino Prison in California, met with Ferritto in Warren as a result of a phone call from Fratianno to Ferritto. As an outgrowth of that discussion, Ferritto was introduced to Tony Delsanter a few weeks later in Warren, Ohio. In a conversation between

Ferritto and Delsanter, Delsanter told Ferritto that there were problems in Cleveland with two people, one by the name of Nardi and one by the name of Greene: "They were trying to muscle in on some of the gambling activities there and that he wanted these people taken care of."

A few weeks later a dinner meeting occurred in Warren, instigated by a call from Ronald Carabbia of Youngstown to Raymond Ferritto. At the meeting were Tony Delsanter, Jack White, Pasquale Cisternino, Ronald Carabbia and Raymond Ferritto. Ferritto testified that the proposition made to him by Delsanter came up. When he asked what he would get, Jack White told him that he would be taken care of. Ferritto accepted the proposition and told them to get in touch with him when they were ready. Later Jack White told him he was to receive "25% of all the gambling and things that were going on in the Warren-Youngstown area."

At another meeting in April 1977, also in Warren, Ferritto talked with Delsanter, Carabbia, Cisternino and John Calandra. Ferritto asked if the deal made earlier was still good, and he was told by Calandra and Delsanter that it was. Ferritto testified to a number of acts which he performed in attempting to murder Greene. He and Cisternino stalked Greene a number of times during the summer of 1977. They went to Greene's apartment at 15500 Lake Shore on several occasions looking for Greene. He said that in September he and Cisternino placed a bomb box near the front door of Greene's apartment with the intention of detonating a bomb as Greene entered or left the building. The bomb box, in evidence, and expert testimony indicate that its open side makes it a shaped charge. Cisternino had put "nails and stuff like that" in a white plastic bottle which Ferritto placed nearby.

After Delsanter's funeral in August 1977, White, Calandra, Carabbia, Cisternino and Ferritto met in Warren. Ferritto told White what he was having problems finding Greene. Greene had no formed habits. He never kept his appointments and was hard to pin down. He also carried a gun. White told him that they were about to put a wiretap on Greene's telephone

in his apartment and they should be getting better information. At this same meeting White told him that Calandra would get him expense money. Soon Carabbia gave him $5,000.

The tapes from the Greene wiretap, when played on a tape recorder, were garbled and not distinguishable. Cisternino, after having Ferritto's tape recorder checked, reported that the tapes did not play on Ferritto's recorder because it had to be run at the same speed as the one that was taping the conversations on the phone tap. With Cisternino's tape recorder, two tapes played clearly.

In early October a call from Ronald Carabbia directed him to come to Struthers. After meeting at his vending company, they drove to Mosquito Lake. Jack White, John Calandra, Pasquale Cisternino, Ronald Carabbia and Raymond Ferritto talked on a boat. At first they thought the Greene situation should be left alone for a while. Then he was asked to listen to a tape on which Greene's girl friend made a dental appointment for him on Thursday of that week at 2:30. The dentist had an office in the Brainard Place building. It was decided to give it a shot. Changing his story from his grand jury testimony in which he named Pasquale Cisternino as his accomplice on October 6, 1977 at Brainard Place, Raymond Ferritto testified at the state court trials that his companion was Ronald Carabbia. At Brainard Place, a red Nova bomb car, which they had placed alongside of Greene's car, was detonated by them by radio control. Greene was killed as he approached the driver's side door of the Lincoln Continental (owned by Keith Ritson). Ferritto's testimony both at the grand juty and at trial was that the bomb was put together by Pasquale Cisternino with Ferritto's assistance at 333 Winchester Apartments on the morning of October 6.

Assuming the jury should make these findings, may they also conclude that White, Delsanter, Carabbia, Cisternino, Calandra and Ferritto comprised an "enterprise"?

While the meetings of the members of the group covered more than a year, the evidence permits findings about the group that are more pervasive. The jury could reasonably find

that the group was concerned about its gambling activities in Cleveland and believed that Nardi and Greene were trying to muscle in on those activities. Such a finding satisfies the first characteristic of an "enterprise." The members of the group (including the defendants) had a "common shared purpose," and the purpose of the association was more than social. Resistance to the "muscling in" by Naardi and Greene showed that the common purpose, business in nature, was to carry on and control gambling activities.

The evidence outlined above also permits the jury to reasonably infer that the group's gambling activities had been carried on for a period that antedated May 1976 and remained in operation during 1977. Such a finding satisfies the second characteristic of an enterprise: that it "function as a continuing unit."

Additional evidence supports the permissible findings of both the group's common purpose and its continuation over a period of time. By September 1977 Jack White was talking about Greene's associates as well as Greene. In his statement, intercepted by court-authorized electronic surveillance on September 24, 1977, Jack White first referred to Danny Greene as "the fucking Irishman," and then referred to his associates:

> Then the rest of the fuckin' cocksuckers. They're on the West Side. They're all with 'em, y'know. Them McTaggert . . . the guy that, uh, that guy who used to work with the barbut game. He went with 'em.

Notably, White identified McTaggert (Greene's nephew) as

> [the] guy who used to work with the Barbut game. He went with 'em.

And he added, "He was working with us."

Thus White separates " 'em [them] with whom McTaggert went from "us" with whom "[McTaggert] was workin'." From White's statements the triers of the fact reasonably may find that Daniel Greene, Kevin McTaggert, Keith Ritson and Brian O'Donnell made up one group operating Barbut games and performing other activities that were "muscling" into the "enterprise" operated by Jack White and the other defendants.

Ferritto quoted Jack White as saying that in return for his getting rid of Greene he was to get a 25 percent cut of "all the gambling and things that were going on in the Warren-Youngstown area." Thus, although the "problem" of Nardi and Greene concerned Cleveland, Jack White's admission permits the inference that the group controlled "gambling and other things" in the Warren-Youngstown area as well. This is corroborated by Tony Delsanter's residence in Warren and Ronald Carabbia's residence in Struthers, near Youngstown.

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), identifies the third characteristic of an "enterprise" as an "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity." Ferritto's testimony permits the finding that White was the top man of the group. Delsanter took up with White the query of Ferritto as to "what was in it for [him]." Eventually Jack White told Ferritto of his "25% cut." Other decisions by White were recounted. For example, White told Ferritto that Calandra would get him expense money, and Carabbia later gave him $5,000. Corroboration that White was the top man of the group is supplied by the intercepted conversations which permit a finding that Calandra deferred to White at all times.

Upon the foregoing testimony there is sufficient evidence to warrant the jury's finding the existence of the alleged enterprise (hereafter the enterprise) and that defendants Licavoli, Calandra, Cisternino and Carabbia were associated with the enterprise.

While the defendants correctly argue that any conspiracy to murder Daniel Greene ended with his murder on October 6, 1977, the evidence permits the finding that the common and shared purpose of the "enterprise" continued after October 6. This inference is permissible because the gambling activities of the group, which might otherwise be found from the evidence, were less likely to continue after Greene's death on October 6.

A finding of continuation of the "enterprise" of the defendants after the death of Greene may be strongly posited

on John Calandra's statements to Jack White during the intercepted conversation of October 7, 1:36 p.m.:

> Keep an eye on this Brian. What's he gonna do? Now Brian will want to run everything.

It may be found that he is speaking of Brian O'Donnell, a lieutenant of Greene, wanting to take over gambling and other activities ("everything") from the "enterprise." White responded, "See, he's the one that cut the deal with that son of a bitch [presumably Greene]." Calandra comes back, "That's why we gotta . . . we're gonna watch him, really." It may be concluded that they are recognizing O'Donnell's threat to their enterprise.

D.

United States v. Griffin, 656 F.2d 996, 1001 (5th Cir. 1981), dealt primarily with the characteristics of an "enterprise" and reviewed the facts which sufficiently established an "enterprise." The court then dealt with proof of the conspiracy charged under §1962(d) and hel that "on much the same analysis of the record [as to enterprise]" it was "satisfied that the evidence of the conspiracy to violate the substantive offense sufficed to support the conviction under §1962(d)."

Similarly, the foregoing proof of an "enterprise" continuing from May to July 1976 until after the death of Daniel Greene sufficiently shows that the alleged RICO conspiracy to control criminal activities in the Northern District of Ohio through certain criminal activities likewise continued during the same period and after the death of Daniel Greene. Noting the statement of John Calandra to Jack White intercepted on October 7, and quoted earlier, this court ruled on June 4, 1982:

> This is highly relevant to show the continuing nature of the alleged RICO conspiracy after the death of Greene. This was evidenced by Calandra's statement to White, "Brian will want to run everything. We're gonna watch him, really."
>
> Defendant Licavoli asserts that
>
> In the first instance there must be sufficient evidence,

independent of any statements supposedly made by Liberatore about Licavoli, to establish the existence of *any* conspiracy between Liberatore and Licavoli.

Defendant Licavoli contends that apart from co-conspirator statements received into evidence under Rule 801(d)(2)(E) there is no independent proof that he and Liberatore are members of the alleged RICO conspiracy. The need for such independent proof is, of course, essential. Among other proof, the requisite membership in the conspiracy is supplied by the act of Tom Lanci, at the direction of Anthony Liberatore, delivering to Licavoli the mug shot of Kevin McTaggert soon after the death of Daniel Greene and Licavoli's acceptance of that mug shot.[2] As concluded, the evidence warrants the finding that the RICO conspiracy was then continuing. Jack White's acceptance of delivery of the mug shot from Liberatore, through Lanci, also is sufficient proof that White treated Liberatore as a member of the "enterprise."

Other linkages between Licavoli and Liberatore exist in the evidence. Raymond Ferritto testified that he was told by John Calandra at the motel that "there was two fellows, and that maybe they could be of some help in the Greene matter." At the motel (apparently another day), John Calandra made a phone call and "one hour or three-quarters of an hour later, Aratari came to the motel room." As a result, Aratari and his partner, Guiles, engaged in certain activities in stalking Greene and were on the Brainard Place scene on October 6.[3]

Aratari was introduced to John Calandra by Anthony Liberatore, undoubtedly prior to the motel meeting. Aratari testified that he was driven by Calandra, with Liberatore slouched down in the back seat, past Greene's apartment house, Greene's

2. The rule is clear that one who joins an existing conspiracy takes it as it is and is therefore accountable for the prior conduct of co-conspirators. *United States v. Sansone*, 231 F.2d 887, 893 (2nd Cir. 1956).

3. Guiles was then armed with the 30.06 Winchester rifle furnished by defendant Lanci. Guiles did not attempt to shoot Greene as he was entering the building, either because he did not see him, because he was fearful when he saw two bodyguards (not seen by anyone else), or because he did not intend to harm Greene (as he now says).

trailer on Waterloo Road, and to Cisternino's apartment on Rondel Road; Cleveland, Ohio. Aratari further testified to meeting John Calandra at a later time in the parking lot of the Ramada Inn on Euclid Avenue near Interstate 90. Liberatore had directed Calandra to go there. At the motel Calandra introduced him to two men who he has since identified as Ray Ferritto and Ronald Carabbia. The back-up role of Aratari and Guiles in the killing of Greene was discussed.

These acts of John Calandra and Liberatore, testified to by both Ferritto and Aratari, are sufficient to warrant a finding that Liberatore, through Calandra, was brought not only into the conspiracy to murder Greene but also into the RICO conspiracy charged in the indictment. Liberatore recognized the threat of Greene to the enterprise.[4]

In turn, through acts of Liberatore and acts of their own, Kenneth Ciarcia and Tom Lanci joined both the enterprise and the RICO conspiracy. Their acceptance of the directions of Liberatore, here held to be a member of the RICO conspiracy, and their own participation in the overt acts, hereafter chronicled, provide circumstantial evidence from which their association with the enterprise and the RICO conspiracy may be found. Also, if the jury finds that Anthony Liberatore and Kenneth Ciarcia each engaged in an act of bribery as a predicate act and that the predicate act furthered the affairs of the enterprise, this would corroborate their association with the enterprise and membership in the RICO conspiracy. It is not necessary that actual knowledge of each other be established among the various conspirators. *United States v. Sutherland,* 656 F.2d 1181 (5th Cir. 1981). Therefore, it is immaterial whether John Calandra, Ronald Carabbia or Pasquale Cisternino knew Tom Lanci or Kenneth Ciarcia or vice versa.

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4. As part of his conversation, Aratari stated that Mr. Liberatore told him:

> Danny Greene is a pretty strong person in this town. He's got control of the West Side. He's got the gambling. He's got the barbut, the vending machines. He's got the music, the prostitution, dope. And he's even into the union.
>
> Jack White is very upset. Jack White is afraid of him, and Jack White wants him out of the way.

In its bill of particulars "to prove the racketeering enterprise conspiracy" the government defined overt acts not set forth in the indictment. The first overt act charges that

> the named Defendants and others conspired to kill Kevin McTaggert, Keith Ritson, and Brian O'Donnell between on or about May, 1976, up to and including on or about March, 1978, in the Northern District of Ohio.

Evidence adduced would permit the triers of the fact to conclude that Kevin McTaggert (Daniel Greene's nephew), Keith Ritson, and Brian O'Donnell were associates of or worked for Daniel Greene. For example, witness Lanci described a meeting at The Flame Restaurant in September 1977 attended by himself, Anthony Liberatore and Mr. Greene, accompanied by Keith Ritson and Brian O'Donnell. At different points in the evidence they are referred to as "Danny Greene's boys" or "the Irish crew."[5]

As this court observed in its oral ruling of June 4, 1982, the jury may find "that Mr. White was personally aware of and, indeed, was taking part in the planning to get at Mr. Greene and to kill him." The jury may further reasonably find that Mr. White regarded "the rest of the . . . cocksuckers . . . on the West Side" as a threat to his enterprise (see also n. 4, *supra*), and that he was planning harm to them as well. In making such a finding, the jury could rely on Tom Lanci's testimony that after the death of Greene, Lanci, at the direction of Anthony Liberatore, delivered personally to Jack White a mug shot of McTaggert. They might find that White intended to use the mug shot to cause injury to McTaggert.

Consistent with the planning of Jack White directed at Daniel Greene and his associates, Anthony Liberatore told Tom Lanci "in regards to now that Nardi was dead, that the

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5. Ferritto links O'Donnell and Ritson with Greene. When asked, "[W]hen was the first time that you heard of Brian O'Donnell?", he responded, "I believe on the tapes, the tapes in the conversation that Greene had on the phone with his son." He then was asked about Ritson and testified, "I was told that he was one of Greene's men."

rest of them had to go."[6] Some time after the Liberatore/Lanci conversation, Liberatore, Lanci and Aratari met in the basement of Local 860, according to Tom Lanci. He stated:

> At that time, we were talking about what will have to be done now, the three of us, and then we decided, the three of us, that McTaggert, Ritson and O'Donnell would have to be taken out now.

"Taking out" meant "killing," he said. He further explained, "Aratari would do the killing, I would supply the information, and Tony would supply the money." The price was $5,000 each for McTaggert, O'Donnell and Ritson. As locations where the individuals might be located, Mr. Lanci named Curry Vending, the Anchor Inn, Travel Lodge on West 150th, the Islander Bar, and the Captain's Quarters. Lanci said that he was "in constant contact with [Aratari] from time to time either by telephone or by seeing him."

Aratari said that Tom Lanci did give him addresses to go to, and pursuant to those addresses he went to the Islander Bar about five times looking for O'Donnell. He went to O'Donnell's house, and he went to McTaggert's house waiting to see if anyone would come around. Nobody did. He went other places. On some occasions Guiles joined him. Guns were carried on at least some of these occasions, each testified.

From the evidence so far reviewed and from other pertinent evidence, the jury may reasonably find that the plan to kill Ritson, McTaggert and O'Donnell, agreed to by Liberatore, Lanci and Aratari, and Aratari's searches, assisted on some occasions by Guiles, of various locations to carry out the

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6. Referring to this conversation with Liberatore, Tom Lanci testified that "some time after the death of John Nardi . . . there was a conversation that took place." Thus he used the death of John Nardi sequentially to show that his conversation with Liberatore occurred after May 17 (the date of Nardi's death), and before August 15 (the Feast of the Assumption). As to the reference to Nardi in the quoted admission of Mr. Liberatore, the statement of Liberatore would make no sense if the reference to the death of Nardi were omitted. None of the facts of the Nardi bombing death or attribution of guilt for that death are contained in Liberatore's statement. Hence, the probative value of the full statement exceeds any possible prejudice that may result by Liberatore's quoted mention of the death of Nardi.

plans were in furtherance of the RICO conspiracy. Since they had to do with removing residual Greene crew threats to the enterprise, these activities may also be found to have furthered the enterprise's affairs.

In a hallway conversation at the Gilmour Party Center on September 24, 1977, Liberatore shifted Aratari and Guiles from stalking Ritson, O'Donnell and McTaggert to assisting the two already stalking Greene (as also testified to by Ferritto). Lanci testified that Anthony Liberatore, Tom Lanci, Victor Guiles and Louis J. Aratari met in the hallway of the Gilmour Party Center on September 24, 1977. Lanci said that this was the second time he had met Guiles. Lanci thus summarized the conversation:

> At that time, while we were having the discussion in the hallway, Tony had told myself, Guiles and Aratari that Jack [White] said that this was taking too long in regards to killing Danny Greene and he told them he was going to hook them up with another guy. Guiles said that he would need a rifle and a car.

Ronald Guiles first testified about other parts of the conversation in the hallway. He said Liberatore asked Ciarcia, who had been summoned from the hall by Lanci, about getting an automobile for Aratari and Guiles. Guiles mentioned a call made by Lanci over the telephone and stated that after the call, Lanci gave a slip of paper to Aratari directing him to go to an address where he was to ask for Diane, telling her his name was Tony DeMarco. (Guiles says this is where the 30.06 rifle was obtained.)

But then Guiles was asked:

Q. What happened then?

A. The conversation was to hurry up and get this job done and this was the first time that I heard the name of Danny Greene.

Q. Who said or mentioned hurry up and get this job done?

A. Mr. Liberatore.

Q. How did you hear the name of Danny Greene?

A. He said words to the effect that this had gone on far

> enough, Jack White wants this done, done right away. You gotta get it done.

Thus this part of Guiles' testimony substantially confirms Lanci's recollection. Referring to the same hallway conversation, Aratari also said that Liberatore quoted Mr. White as saying that he wanted Greene "out of the way now."[7]

Thus, three witnesses agree that Liberatore in words or substance quoted Jack White as saying that it was taking too long to kill Greene and that he wanted him out of the way now. From this congruent part of three recitations of the same conversation and from Liberatore's direction to Aratari to meet Calandra at the Ramada Inn in order to meet two persons later identified as Raymond Ferritto and Ronald Carabbia, the jury may reasonably find that Liberatore and White had discussed plans to kill Greene,[8] that the plan to kill Greene was related to the plan to kill his three associates and that both plans were part of the continuing purpose of the "enterprise" to control activities in the Northern District of Ohio. Hence, the jury may find that the plan to kill McTaggert, Ritson and O'Donnell, like the killing of Greene, was part of the enterprise's activities and in furtherance of the RICO conspiracy.

Overt Act C of the government's bill of particulars charges:

> C. [t]hat the named Defendants and others attempted to kill Keith Ritson and Brian O'Donnell on or about November 14, 1977, in the Northern Division of Ohio.

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7. When Guiles asked Liberatore who Jack White was, Aratari said Liberatore told Guiles "he's the number one man." Aratari also testified that Liberatore told Vic and him "that at that time he was second in command." Naming White as number one man corroborates the command structure of the enterprise.

   This admission of the chain of command by Liberatore provides the jury an added fact from which they may infer that White directed the shift of Aratari and Guiles from stalking Greene's associates to working with Ferritto an added fact from which they may infer that White directed the shift of Aratari and Guiles from stalking Greene's associates to working with Ferritto and Carabbia in their efforts to kill Greene.

8. Aratari quoted Tony Liberatore as saying, "We want you off all them people [Ritson, McTaggert and O'Donnell], and Mr. White wants you to get on Danny Greene with the other two."

Direct proof of the continuation of the RICO conspiracy after the death of Greene is provided by Liberatore and Lanci's direction to Aratari that they still wanted him to keep going — "Let's get rid of them [Ritson, O'Donnell and McTaggert]." Lanci made clear that when he said "get rid of them," he meant "kill them." Lanci's testimony was reinforced on cross-examination. Asked, "Now you didn't direct him [Aratari] to go out there on the 14th to throw a grenade or hurt Mr. Ritson, did you?", he answered:

> Well, it was part of the deal right from the beginning to get all three of them so he was on his own as far as when, where and how.

Hence, it is concluded that the jury may reasonably find that Aratari's attempt to kill Ritson and O'Donnell on November 14 by throwing a hand grenade at them at the Ritson home (as Aratari testified) was part of the enterprise's activities and in furtherance of the alleged RICO conspiracy. In view of this conclusion, defendants' motion to strike all of the testimony of witness Aratari relating to the November 14 grenading is denied. As a consequence of this ruling, the Islander Inn's Department of Liquor Ownership document, government's exhibit No. 65, is received in evidence.[9]

In its bill of particulars the government states as the final overt act:

> D. [t]hat the named Defendants and others attempted to kill Brian O'Donnell on or about February 27, 1978, in the Northern District of Ohio.

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9. The government sought to offer in evidence a Department of Liquor Control report of corporate stockholders of 7581 Pearl Road, Inc., doing business as the Islander Inn. Brian P. O'Donnell is listed as president of the corporation. He has been president since 1975.

Defendants asked that the testimony be stricken, or, in the alternative, that the court withhold its ruling on the admission of the document. After hearing arguments of counsel, the court withheld receiving the exhibit "to address this point in a little broader form." The court reserved ruling, stating:

> I will take another look at it and, particularly, in light of the arguments that have been made here and will make a ruling on this evidence at a later time.

At the pretrial hearing of March 31, 1982, defendants moved to strike all of the overt acts set forth in the government's bill of particulars. Especially, however, defendants objected to overt act "D" because on February 27, 1978, defendants Licavoli, Cisternino and Carabbia were confined in the County Jail and were on trial in the state court for the killing of Danny Greene. Moreover, Mr. Calandra was hospitalized during this period. The government responded:

> The government will establish that the impetus, the direction for the commission of these overt acts, took place before their incarceration, their hospitalization. The mere fact that they are in another area, geographic area after putting something into motion does not excuse them in any way.

The evidence, here highlighted, supports the government in its contention. Hence, evidence relating to the attempt of Louis J. Aratari to kill Brian O'Donnell on or about February 28, 1978, at which time he was arrested while in the vicinity of the Islander Bar, will not be stricken from the record. On the basis of the earlier findings that the jury may make concerning overt acts A and C, the jury may find that the evidence concerning overt act D shows that the acts of Aratari, which led to his arrest, related to the enterprise's activities and furthered the alleged RICO conspiracy.[10]

E.

In *Kotteakos v. United States,* 328 U.S. 750 (1946), the question before the Court was

> whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure. . . .

Ibid., at 752. Thus the focus in the case was not on multiple

10. Defendants' various motions to strike the evidence relating to overt acts A, C and D of the government's bill of particulars are denied.

versus single conspiracies but on whether the harmless error doctrine

> may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

Ibid., at 758.

The jury had been instructed as to a single conspiracy. The Court concluded that the trial court's confusion of "the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character," *ibid.*, at 769, could not be considered harmless error. The government would not be permitted to "string together" eight "separate and distinct crimes" when the only nexus between them was a common key figure. *Ibid.*, at 773. It is important to note that the Court stated, "The jury could not possibly have found, upon the evidence, that there was only one conspiracy." *Ibid.*, at 768.

In *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), the court dealt with the issue of multiple conspiracies in the RICO conspiracy charge context. The court clarified its holding in *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978), by repeating its reasoning:

> Under the general federal conspiracy statute, "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes." *Braverman v. United States*, 317 U.S. 49, 53; 63 S.Ct. 99, 102; 87 L.Ed. 23 (1942). In the context of organized crime, this principle inhibited mass prosecution because a single agreement or "common objective" cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals.

> *RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes.* Thus, the object of a RICO conspiracy is to violate a substantive RICO provision — here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity — and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different or even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. *To find a single conspiracy, we still must look for agreement on the overall objective.* What Congress did was to define that objective through the substantive provisions of the Act.

571 F.2d, at 902-03 (emphasis added; footnote omitted). *Sutherland, supra,* at 1192.

Thus, the court concluded that "[w]hat RICO does is to provide a new criminal objective by defining a new substantive crime." *Sutherland, supra,* at 1193. While persons might not have been tried for their separate acts under pre-RICO law, they are "properly tried together under RICO [where] the evidence establish[es] an agreement to commit a substantive RICO offense, *i.e.*, an agreement to participate in an enterprise through a pattern of racketeering activity." *Ibid.*

As defendant Licavoli points out, the Sixth Circuit "accept[ed] and agree[d] with the principles of the *Kotteakos* case" in *United States v. Sutton,* 642 F.2d 1001, 1021 (6th Cir. 1980). At the same time the court stated:

> The Supreme Court has never held that it is a requirement of a valid conviction for conspiracy that every conspirator must have "agreed, intended to conduct or participated" in every crime committed by other co-conspirators in the

> event the crime was within the scope of the conspiracy which he was proved to have joined.

Ibid., at 1017. The court then adopted much of the language quoted above from *Elliott* relating to the nature of a RICO conspiracy charge.

In *Sutherland*, the court, on the authority of *Kotteakos*, found "that the multiple conspiracy doctrine precluded the joint trial of the two multiple conspiracies on a single RICO conspiracy count." Nevertheless, applying *Kotteakos*, the court concluded that the error did not affect the "substantial rights" of the convicted defendants.

Just before it found error under *Kotteakos*, the court thus summarized *Elliott*:

> What *Elliott* does state is twofold: (1) a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense; and (2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, *i.e.*, evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO.

The jury need not be charged on multiple conspiracies in the present case. In the organization of the jury charge, before the jury might reach a question of multiple conspiracies, it must first find the presence of an "enterprise" and a single or unified RICO conspiracy. Should it determine that there is no "enterprise" within the meaning of §1961(4) or that there is no RICO conspiracy, as alleged; that is, that there was no agreement "to commit a substantive RICO offense," it would then be required to find each defendant not guilty. On the other hand, if the existence of both an "enterprise" and "a single conspiracy" are found by the jury to have been proved, under *Elliott* the finding of an agreement to commit a substan-

tive RICO offense makes the presence of multiple conspiracies immaterial.[11]

F.

Defendant Liberatore argues that there is in the record insufficient evidence to submit the bribery predicate acts issue to the jury. He argues that neither Jeffrey nor Geraldine Rabinowitz was promised anything of value by him and that the $14,900 given to them was a loan "with no strings attached."

Geraldine and Jeffrey Rabinowitz each testified that in December 1976 they had a conversation with defendant Ciarcia about a court case involving Mrs. Rabinowitz's house. At that time Ciarcia told them he "might be able to get it handled."

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11. Asserting a separate antagonistic conspiracy of Liberatore, Lanci and Aratari, defendant Carabbia and defendant Licavoli move to strike the following testimony of Mr. Aratari:

> Mr. Liberatore, he says, if you take part in taking Danny Greene out, you don't have to worry about no money in this town. Wherever you go, you will be respected, and you, Tom Lanci, and I, myself, will run this town. Licavoli don't have to know nothing about it. [Part of a larger conversation with Mr. Liberatore said by Aratari to have occurred in August.]

At this point counsel for defendant Carabbia moved to strike this testimony (joined in by defendant Licavoli) because, as he put it, "Now, Your Honor, that's — he is on his own deal now with this Liberatore." This testimony is not inconsistent with a finding of a single RICO conspiracy. Aratari himself testified as to other statements of Liberatore that dispel any contention of defendants Carabbia and Licavoli that Liberatore sought to create a group that, on its own, would kill Greene and overturn Licavoli's leadership:

> Q. Now, you remember vividly that every time you were told to go kill somebody or whatever in connection with Danny Greene, that you were told that the orders came from Mr. Licavoli; is that what you are telling the jury?
>
> A. Licavoli always had to give the permission to go on with the work.
>
> Q. And you knew that at all times, that these orders were coming from Licavoli, right?
>
> A. Mr. Liberatore made me understand that. He said he was second in command to Licavoli.

Of course, the statements of Mr. Liberatore concerning Jack White's wishes reportedly made to Lanci, Guiles and Aratari in the hallway of the Gilmour Party Center on September 24, 1977 and Liberatore's direction to Tom Lanci to deliver the mug shots of McTaggert and Bostick to Jack White after the death of Danny Greene indicate Liberatore's allegiance to Jack White.

On subsequent occasions he told them not to worry about the case; "it's being handled."

According to Geraldine Rabinowitz, in the spring of 1977 Ciarcia asked her to check three names for him in the FBI files: Licavoli, Liberatore and Ciarcia. That investigation report was turned over to Ciarcia at Noreen Orlowe's house in the presence of Tom Lanci.[12] About a week later she was asked by Ciarcia to obtain the informant key so that he could translate the numbers on the documents to names. Such a list was supplied in early July 1977.

In late June or early July she supplied Ciarcia with requested information on a wiretap. The document was turned over to Ciarcia at Noreen Orlowe's house; at that time Mrs. Rabinowitz was introduced to defendant Liberatore. She was asked by Liberatore whether she could get information on an IRS investigation on him.

At another time in July 1977, Ciarcia told Mrs. Rabinowitz that he and Liberatore were concerned about being followed and wanted a list of license plate numbers and car makes used by the FBI. A copy of such a list was given to Ciarcia in mid-August 1977. Additional documents were supplied in July and August of 1977, including a further informants list.

During that period of time, Mrs. Rabinowitz testified, she and Jeffrey Rabinowitz had undertaken the building of a home. She had conversations with Ciarcia about the building of the home "all summer long." Ciarcia told them to go ahead with the building because her court case would be resolved. She testified that at the September 24 wedding of Noreen Orlowe's daughter, Liberatore asked her "how the foundation was on [her] house."

On October 12, 1977 she and Jeffrey met with Ciarcia, Lanci and Liberatore at Orlowe's home. They explained to Liberatore that they did not have the $15,000 for the down payment on the house. Liberatore told them "he never had

12. Mrs. Rabinowitz testified that she heard someone else arrive at the house but did not know who it was. Lanci testified that the person was Liberatore.

any intention of giving [her] that kind of money. . . . He said obviously there had been a lack of communication, that Mr. Ciarcia was never told to tell [them] to go ahead with the building of the home."

Jeffrey Rabinowitz testified on cross-examination that October 12 was not the first time he had indicated he wanted money: "We told Ken after the court case was lost that if we didn't have the court case won we were going to need some money." Although he could not fix a date for the conversation, he said it was prior to the turning over of all the documents.

He further testified that on October 12 he asked Liberatore, Lanci and Ciarcia "if [they] were going to get the money to complete the transaction on [their] home." Liberatore responded "that he did not promise [them] any money and where did they get the impression that [they] had money coming?" When Jeffrey told him "Ken told us we were covered all the way," Liberatore asked, "Did I personally promise you anything?" The discussion of a loan then came up; Jeffrey testified that he "believe[d] Liberatore suggested it.

A discussion ensued as to repayment. Jeffrey told Liberatore they had $5,200 coming from the fraudulent ring claim.[13] They further "explained that Gerry had approximately $3,000 to $3,600 coming from the settlement on her house." Ciarcia told Liberatore that Jeffrey "was good for" the difference.

The following day the Rabinowitzes returned to Orlowe's home. Jeffrey was sent to Liberatore's car for a paper bag, which Liberatore handed to Geraldine. It contained $15,000. The next day Ciarcia presented the Rabinowitzes with a cashier's check for $14,900 to avoid questions as to the cash source.

Geraldine testified that at no time was there any discussion as to payment of interest, due date of the loan, or collateral. On cross-examination the following exchange occurred:

> Q. Okay, now at no time up until the day you were arrested did Mr. Liberatore ever call you and ask you for any money?

13. Liberatore asked who had the ring; Lanci responded that he did. Liberatore then told Lanci he wanted the ring so he could sell it.

A. No, he did not.

Q. At no time, when you saw him in person at any place, if you did, he never asked you for any money?

A. No, he didn't.

• • •

Q. Now, when that money was passed to you, Gerry, on October the 13th of 1977, isn't it true that Mr. Liberatore did make a statement to you to the effect that there were no strings attached, that he would never be knocking on your door or asking you for any favors?

A. That's what he said, yes.

Jeffrey Rabinowitz testified that the loan was never repaid. However, a $4,000 insurance check from the fraudulent ring claim was endorsed by Geraldine and turned over to Ciarcia.

Defendant Liberatore argues that he did not promise Geraldine or Jeffrey Rabinowitz a "thing of value," as is required by 18 U.S.C. §201(b)(3). However, the above cited testimony would permit a jury to find that Geraldine Rabinowitz was acting with the understanding that her court case was "being handled" for her. A jury may find that this constitutes a "thing of value." Further, the October 13, 1977 net payment of $14,900 by Liberatore, after he learned that Kenneth Ciarcia had told the Rabinowitzes to go ahead with the house and that they were "covered all the way" — promises made contemporaneously with the passing of the FBI stolen documents — may be found by the jury to have constituted the giving of a thing of value both by Mr. Liberatore and by Mr. Ciarcia.[14]

Defendant Liberatore further argues that the $14,900 was a loan, not a bribe. The fact that there was no discussion of

14. Liberatore argues that the resolution of the court case cannot be considered "a thing of value" because the indictment is limited to the $14,900. The indictment reads "would corruptly give and loan and promise to give and loan *things* of value, *including* approximately [14,900], more or less. . . ." (Emphasis added.) The use of *things*, plural, indicates that the government intended to offer evidence of more than just the cash. Also, the term *including* is used rather than *to wit* or *specifically*. Thus the indictment conveys that *one* of the things of value offered was the money.

interest or of a repayment schedule, no assignment of collateral, and no insistence or even request for repayment by or on behalf of defendant Liberatore would permit the jury to find that indeed the payment was not a loan but was retroactive payment for Geraldine's theft of the FBI confidential documents and her turning them over to Ciarcia and Liberatore.

While no defendant at the oral hearing argued insufficiency of the proof as to the predicate acts of conspiracy to murder Greene and the murder or aiding or abetting the murder of Greene, such contentions are deemed subsumed by the several acquittal motions. As to defendant Licavoli, the evidence reviewed in Part C, and as to defendants Calandra, Cisternino and Carabbia, the evidence reviewed in Parts C and D, is sufficient to support a finding by the jury that each of these defendants willfully and knowingly committed the predicate act of conspiracy to murder Greene and that each did murder Greene or aid and abet the murder of Greene. Turning to defendants Liberatore and Ciarcia, the evidence reviewed in Part D is sufficient to warrant a finding by the jury that these defendants conspired to murder Greene and aided and abetted the murder of Greene.

G.

18 U.S.C. §1962(c) requires that each defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . . " Under §1961(5):

> A "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Each of the six defendants contends that the predicate acts of conspiracy to murder Greene and the murder of Green cannot be considered as part of a "pattern of racketeering activity." Defendants assert that the conspiracy to murder Greene and the murder of Greene were isolated criminal activities, as opposed to criminal acts carried out in furtherance of the enterprise's affairs and the alleged RICO conspiracy. Defendants Liberatore and Ciarcia similarly argue that the bribery of Ger-

aldine Rabinowitz was an independent criminal act and not part of a pattern of racketeering activity. Taken together, defendants are contending that none of the three predicate acts of racketeering relied on by the government can be used to prove that a given defendant participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity."

United States v. Turkette, 452 U.S. 576 (1981), emphasizes that after an enterprise is proven, the government must prove a "*connected* 'pattern of racketeering activity.' " *Ibid.*, at 583 (emphasis added). *Turkette* states:

> The pattern of racketeering activity is . . . a series of criminal acts as defined by the statute, 18 U.S.C. §1961(1). . . . The [pattern] is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. . . . " *Ibid.*, at 583.

A RICO defendant's involvement in the enterprise is proven by demonstrating his participation in the "connected" pattern of racketeering activity. To do this, the government must demonstrate that the defendant participated in two or more of the statutorily enumerated predicate criminal activities in furtherance of the enterprise's affairs. *United States v. Elliott*, 572 F.2d 880, 902-903 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978). "The predicate crimes need only be related to the affairs of the enterprise — they need not be related to each other." *United States v. Bright*, 630 F.2d 804, 830, n. 47 (5th Cir. 1980). Thus, a defendant participates in an enterprise "through a pattern of racketeering activity" if the government's evidence connects the predicate criminal activities committed by the defendant to the affairs of the enterprise. *United States v. Turkette*, *supra*, at 583; see also *United States v. Bright*, *supra*, and *United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir. 1981).

The government has introduced sufficient evidence to allow the jury to infer that the conspiracy to kill Greene, and the murder or the aiding and abetting of the murder of Greene, furthered the aims, ambitions, and affairs of the enterprise. Raymond Ferritto's testimony, summarized above, makes it

evident, and a jury may find, that he was hired to stalk and kill Daniel Greene because Greene was "muscling in" on the enterprise's activities. Similarly, Louis Aratari testified that he was put on the "Greene case" because Greene was "getting strong" and "taking over." Aratari testified that Liberatore told him Jack White was "upset" because Danny Greene "is a pretty strong person in this town" and he had "control of the West Side." As noted above, the jury may find that Jack White's concern over this threat to the enterprise caused him (1) to conclude that he wanted "Danny Greene out of the way now"; and (2) to put Aratari and Guiles on Greene as a back-up hit team.

Similarly, evidence has been introduced which enables the jury to reasonably infer that the predicate act of bribery furthered the interests of the enterprise, *i.e.*, the enterprise identified and described in part C. FBI agents have testified that defendants Liberatore and Ciarcia obtained current investigation reports and informants lists from confidential FBI files. The jury cold reasonably infer that defendants Liberatore and Ciarcia sought the investigation reports and informants' names to protect the enterprise against damaging FBI investigations. The agents additionally testified that a list of the FBI agents' cars and license numbers was obtained. The jury could reasonably find that the license numbers were invaluable to the enterprise in monitoring and protecting itself against FBI activities.

Defendants Calandra and Licavoli argue that they cannot be "associated with an enterprise that had bribery as an objective because [they were] acquitted of the bribery charges." Defendants Calandra and Licavoli's acquittals on the bribery charges in no way preclude the finding that the bribing of Geraldine Rabinowitz furthered the aims and affairs of the enterprise. Their prior acquittals merely protect them against the jury's determining their involvement in the enterprise on the basis of participation in the predicate act of bribery.[15] All mem-

15. Their participation in the enterprise through a "pattern of racketeering activity" can be shown only by proving their involvement in the predicate acts of conspiracy to murder Greene and the murder of Greene.

bers of an enterprise need not participate in each and every criminal activity which furthers the aims and goals of that enterprise. As previously stated:

> Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through differet, even unrelated crimes, so long as we may infer that each crime was intended to further the enterprise's affairs.

United States v. Elliott, 571 F.2d, at 902-903.[16] See also *United States v. Sutton, supra,* at 1037.

In conclusion, there is sufficient evidence in the record for the jury to tie the conspiracy to murder Greene, the murder of Greene, and the bribing of Geraldine Rabinowitz into the enterprise's affairs. Therefore, these three predicate acts may be used to show that the various defendants participated in the enterprise's affairs through a pattern of racketeering activity.

H.

Defendants contend that the government has failed to prove the requisite nexus between the enterprise's activities and interstate commerce. Under §1962(c), defendants must be employed by or associated with

> [an] enterprise engaged in, or the activities of which affect, interstate or foreign commerce. . . .

"It is the enterprise, not the individual defendant, which must engage in or affect interstate commerce." *United States v. Groff,* 643 F.2d 396, 400 (6th Cir. 1981).

The government's evidence establishes that the affairs of

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16. Further proof that the predicate acts of conspiracy to murder Greene, the murder of Greene, and the bribery of Geraldine Rabinowitz were part of a "pattern of racketeering activity" was introduced in the evidence relating to the overt acts in furtherance of a plan to kill Kevin McTaggert, Keith Ritson and Brian O'Donnell. See part E, *supra.* Licavoli's statement of September 24, 1977 concerning the "West Side cocksuckers" can be read as showing that the enterprise viewed McTaggert, Ritson and O'Donnell as part of Danny Greene's gang. The enterprise's goal of eliminating the entire Greene gang helps demonstrate that the killing of the gang's leader, Danny Greene, was integral to the ongoing objective of controlling criminal activities and not an isolated event unrelated to the enterprise's affairs and purposes.

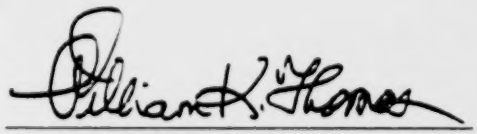
the enterprise affected interstate commerce. In *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981), the use of out-of-state supplies in a bookmaking operation "provided a sufficient nexus between the enterprise and interstate commerce to invoke RICO." In this case Raymond Ferritto traveled from Pennsylvania to Ohio to engage in the enterprise's affairs. Durin his trips he stayed in hotels and used his credit card. A blue Plymouth car used by Mr. Ferritto was driven to Pennsylvania, and a title was obtained fraudulently under a name other than Raymond Ferritto. *Cf. United States v. Altomare*, 625 F.2d 5, 8 (4th Cir. 1980).

Moreover, the enterprise obtained information about Danny Greene through the use of an illegal phone tap. Raymond Ferritto testified that such a tap was placed on Mr. Greene's phone. When Greene's girl friend called to make a dental appointment for him, the call was intercepted, and the information was used in planning the Brainard Place bombing.

Thus, in carrying out its activities, the enterprise affected interstate commerce as required by §1962(c).

On the grounds discussed and on all other grounds advanced by each defendant, the Rule 29 acquittal motion of each defendant is overruled.

IT IS SO ORDERED.



U. S. DISTRICT SENIOR JUDGE

APPENDIX E: RELEVANT RULES AND STATUTES

I. Federal Rules of Criminal Procedure

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 31. Verdict

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

Rule 404

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; . . .

Rule 801

* * *

(d) Statements which are not hearsay. A statement is not hearsay if —

* * *

(2) Admission by party-opponent. The statement is offered against a party and is

* * *

(E) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

II. Revised Code of Ohio

§2923.01. Conspiracy

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, trafficking in drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one

or more of them will engage in conduct which facilitates the commission of any such offense.

• • •

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

III. Title XVIII, United States Code

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717)

§1961. Definitions

As used in this chapter —

(1) "Racketeering activity" means

(A) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(B) Any act which is indictable under any of the following provisions of Title 18, United States Code: §201 (relating to bribery); §224 (relating to sports bribery);

§§471, 472 and 473 (relating to counterfeiting); §659 (relating to theft from interstate shipment) if the act under §659 is felonious; §664 (relating to (relating to embezzlement from pension and welfare funds); §§891-894 (relating to extortionate credit transactions); §1084 (relating to the transmission of gambling information; §1341 (relating to mail fraud); §1343 (relating to wire fraud); §1503 (relating to obstruction of criminal investigations); §1511 (relating to the obstruction of State or local law enforcement); §1951 (relating to interference with commerce, robbery, or extortion); §1952 (relating to racketeering); §1953 (relating to interstate transportation of wagering paraphernalia); §1954 (relating to unlawful welfare fund payments); §1955 (relating to the prohibition of illegal gambling businesses); §§2314 and 2315 (relating to interstate transportation of stolen property); §§2341-2346 (relating to trafficking in contraband cigarettes); or §§2421-2424 (relating to white slave traffic);

(C) Any act which is indictable under Title 29, United States Code, §186 (dealing with restrictions on payments and loans to labor organizations) or §501(c) (relating to embezzlement from union funds); or

(D) Any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States:

• • •

(3) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union

or group of individuals associated in fact although not a legal entity;

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.